IN THE

Supreme Court of the United States

OCT 30 1974
MICHAEL RODAK, JR., C

October Term, 1974
No. 74-508

CALIFORNIA HIGHWAY COMMISSION, DEPARTMENT OF PUBLIC WORKS, *et al.*,

Petitioners,

vs.

RALPH W. KEITH and ESTHER MAY KEITH, husband and wife, *et al.*,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI.

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SUBJECT INDEX

Page

Petition for Writ of Certiorari 1

A. Opinions Below 1

B. Jurisdiction 2

C. Questions Presented for Review 2

D. Statutes and Regulations Involved in the Case 3

E. Statement of the Case 4

F. Reasons for Granting the Writ 7

I.

Certiorari Must Issue to Disapprove the Simplistic Formula Used by Lathan and Keith for Implementation of NEPA, and End Conflict With Controlling Authority Throughout the Nation, and Particularly Within the Ninth Circuit 7

II.

A Critical Question Involving Federal-State Cooperation Is Presented and Should Command This Court's Attention 11

III.

Lathan and Keith Are Contrary to United States v. SCRAP, and Congressional and Regulatory Enactments Intended to Insure Compliance With NEPA 15

IV.

If the Ninth Circuit Court Opinions in Keith and Lathan Are Correct Statements of the Law, There Can Be No Injunction Herein 17

INDEX TO APPENDICES

Page

Appendix A. Opinion of the United States Court of Appeals for the Ninth Circuit, Dated December 3, 1973.

Appendix B. Opinion of the United States Court of Appeals for the Ninth Circuit, No. 72-3072, Dated September 27, 1974.

Appendix C. Opinion of the United States Court of Appeals for the Ninth Circuit, Nos. 72-2932 and 72-2974, Dated September 27, 1974.

Appendix D. Motion and Order Granting in Part and Denying in Part Plaintiffs' Motion for a Preliminary Injunction.

Appendix E. Statutes and Implementing Regulations

TABLE OF AUTHORITIES CITED

Cases	Page
Arlington Coalition on Transportation v. Volpe (4th Cir. 1971) 458 F.2d 1323, cert. den. 409 U.S. 1000	8
Citizens Environmental Council v. Volpe (10th Cir. 1973) 484 F.2d 870, cert. den. 42 U.S.L.W. 3584	9
Citizens of Marlboro v. Volpe (3rd Cir. 1972) 459 F.2d 332	9
Clark v. Volpe (5th Cir. 1972) 461 F.2d 1266, affirm. 342 Fed. Supp. 1324	9
Environmental Defense Fund v. Froehlke (8th Cir. 1973) 477 F.2d 1033	9
Jicarilla Apache Tribe v. Morton (9th Cir. 1973) 471 F.2d 1275	9, 10
LaRaza Unida v. Volpe (9th Cir. 1973) 488 F.2d 559, cert. den. 409 U.S. 890	9, 13
Lathan v. Brinegar, No. 72-2932	2
Lathan v. Volpe (9th Cir. 1971) 455 F.2d 1111	9, 10, 11, 12, 13, 14, 16, 17
Lathan v. Volpe, Nos. 72-2974 and 72-2932 (rep. 5 Env. Law Rep. 20083)	1
Lathan v. Washington State Highway Commission, No. 72-2974	2
Monroe County Conservation Council, Inc. v. Volpe (2nd Cir. 1972) 472 F.2d 693	8
Movement Against Destruction v. Volpe (4th Cir. 1974) 499 F.2d 29, affirm. Movement Against Destruction v. Volpe, 361 Fed. Supp. 1360	8
Pennsylvania Environmental Council, Inc. v. Bartlett (3rd Cir. 1971) 454 F.2d 613	9

Page

Ragland v. Muller (5th Cir. 1972) 460 F.2d 1196 .. 9

Ralph W. Keith v. John A. Volpe (D.C. C.D. Cal. 1972) 352 Fed. Supp. 1324 .....1, 2, 5, 6 .....7, 9, 10, 11, 13, 14, 15, 16, 17

Robinswood Community Club v. Volpe (9th Cir. 1974) .... F.2d ...., rep. 5 ELR 20378, 6 ERC 1401 .....9, 10

San Antonio Conservation Society v. Texas (5th Cir. 1974) F.2d 14

San Francisco Tomorrow v. Romney, 472 F.2d 1021 10

Swain v. Brinegar (D.C. S.C. Ill.) 378 Fed. Supp. 753 9

Township of Hopewell v. Volpe (3rd Cir. 1971) 446 F.2d 167 8

Township of Hopewell v. Volpe (3rd Cir. 1973) 482 F.2d 376 .....8, 9

United States v. SCRAP, 412 U.S. 669 ....8, 11, 15, 17

Wildlife Preserves, Inc. v. Volpe (3rd Cir. 1971) 443 F.2d 1273 9

Federal Register

38 Federal Register, p. 20556, Sec. 1500.9d 3

38 Federal Register, p. 20556, Sec. 1500.10 3

38 Federal Register, pp. 20555-20556 (8-1-73), Sec. 1500.13 .....3, 8

Miscellaneous

House Report 93-118 12

8 U.S. Code Congressional and Administrative News, pp. 2612-2614 12

Rules	Page
Supreme Court Rules, Rule 23(5)	2

Statutes

California Public Resources Code, Sec. 21000	6
Code of Federal Regulations, Title 23, Sec. 1.38	3, 8, 13, 15
Code of Federal Regulations, Title 23, Sec. 772	15
Code of Federal Regulations, Title 23, Sec. 772.6 (c)(1)	4
Code of Federal Regulations, Title 23, Sec. 790	15
Code of Federal Regulations, Title 23, Sec. 790 (b)(1)	16
Code of Federal Regulations, Title 23, Sec. 790 (2)(1)	16
Code of Federal Regulations, Title 23, Sec. 790.3	4
Code of Federal Regulations, Title 23, Sec. 790.3 (a)	12
Code of Federal Regulations, Title 23, Sec. 790.3 (b)	12
Code of Federal Regulations, Title 23, Sec. 790.5 (d)	4
Code of Federal Regulations, Title 23, Sec. 790.5 (g)	4
Code of Federal Regulations, Title 23, Sec. 790.6 (g)	4
Code of Federal Regulations, Title 23, Sec. 790.8 (b)(2)(v)	4
Code of Federal Regulations, Title 23, Sec. 795	15
Code of Federal Regulations, Title 23, Sec. 795.4 (d)	4

Page

Highway Act of 1973, Sec. 154 .....13, 14
Public Law 91-605 (1970) 15
Public Law 93-87 .....12, 14
United States Code, Title 5, Sec. 706(2)(A) 8
United States Code, Title 5, Sec. 706(2)(D) 8
United States Code, Title 23, Sec. 101(b) 11
United States Code, Title 23, Sec. 103(e) 3
United States Code, Title 23, Sec. 105(a) 3
United States Code, Title 23, Sec. 106(a) 3, 7
United States Code, Title 23, Sec. 108(c)(2) 12
United States Code, Title 23, Sec. 109 16
United States Code, Title 23, Sec. 109(h) 4, 15, 16
United States Code, Title 23, Sec. 109(i) 4, 15, 16
United States Code, Title 23, Sec. 128 4
United States Code, Title 23, Sec. 128(a) .....
.....3, 8, 10, 16
United States Code, Title 28, Sec. 1254(1) 2
United States Code, Title 28, Sec. 2201 4
United States Code, Title 42, Sec. 4332(2)(c) (NEPA) 3

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PETITION FOR WRIT OF CERTIORARI.

A. OPINIONS BELOW.

This petition concerns *Ralph W. Keith v. John A. Volpe* (D.C. C.D. Cal. 1972) 352 Fed. Supp. 1324 (Appendix "D"), appealed by petitioner, resulting in reversal by the opinion filed December 4, 1973 which is set forth in Appendix "A". That opinion was withdrawn to consider *en banc* a conflict with the December 7, 1973 opinion in *Lathan v. Volpe,* Nos. 72-2974 and 72-2932 (reported at 5 Env. Law Rep. 20083). Opinions filed September 27, 1974 following rehearing *en banc* in *Keith* and *Lathan* are set forth in Appendices "B" and "C" respectively and are the subject of this petition.

B. JURISDICTION.

Jurisdiction of this Court is invoked to review the judgments of the Ninth Circuit Court of Appeals filed September 27, 1974 in *Keith, et al v. California Highway Commission* (No. 72-3072) (hereinafter *Keith*) and, pursuant to Supreme Court Rule 23(5), the closely related cases of *Lathan v. Brinegar,* No. 72-2932 and *Lathan v. Washington State Highway Commission,* No. 72-2974 (hereinafter *Lathan*).

Plaintiffs in the first *Keith* opinion (Appendix "A") and defendants in the *Lathan* case moved for rehearing. By order of April 11, 1974, both motions were granted and a rehearing *en banc* ordered for June 12, 1974, resulting in simultaneous filing of both opinions on September 27, 1974.

On October 17, 1974, petitioner moved to stay issuance of mandate for thirty days pending this petition. By order filed October 18, 1974, the stay was denied as to *Lathan* and granted to Sunday, October 27, as to *Keith*. Application for continued stay of mandate was filed by petitioner October 25, seeking an additional stay to November 4.

28 U.S.C. 1254(1) confers jurisdiction upon this Court to review both opinions.

C. QUESTIONS PRESENTED FOR REVIEW.

In a case involving at least 10 years of close Federal-State planning and cooperation and right of way acquisition in anticipation of construction of a Federal-Aid Highway, the following questions are posed:

1. Is the step at which to test compliance with applicable federal statutes and regulations postponed until the *final* Federal action?

2. If the answer to the first question is affirmative, must all State and Federal compliance be judged by the law as it may exist at that future time?

3. Is there only one *major* Federal action which affects the quality of the human environment and is therefore subject to NEPA?

4. Did the enactment of NEPA impliedly repeal other statutes and regulations governing the orderly administration of the Federal-Aid Highway Act?

5. Is the orderly planning process of the Federal-Aid Highway Act and envisioned in NEPA to be vitiated by a strained construction of the Highway Act?

D. STATUTES AND REGULATIONS INVOLVED IN THE CASE.

This case involves the National Environmental Policy Act (hereinafter NEPA), the Federal-Aid Highway Act and implementing regulations for both. Statutes followed by implementing regulations are set forth in Appendix "E", in the following sequence:

42 U.S.C. 4332(2)(c) (NEPA);

CEQ Guidelines for preparation of Environmental Impact Statements, 38 Fed. Reg. 20556, §§1500.9 (d), 1500.10, 1500.13

Federal Highway Administration Guidelines for Implementation of NEPA, PPM 90-1, 23 C.F.R. 1.38, App. A, paragraphs 5(b), 5(c), 6(h), 6(i)

23 U.S.C. 103(e)
23 U.S.C. 105(a)
23 U.S.C. 106(a)
23 U.S.C. 128(a)

Implementing regulations in 23 C.F.R. 790.3, 790.5(d), 790.5(g)

23 U.S.C. 109(h)

23 U.S.C. 109(i)

Implementing regulations in 23 C.F.R. 772.6(c)(1), 790.6(g), 790.8(b)(2)(v) and in 795.4(d).

E. STATEMENT OF THE CASE.

Plaintiffs sought declaratory and injunctive relief in the district court to halt all further activity on the Interstate 105 Freeway-transit facility in Los Angeles County. It was proposed as a multi-lane facility with center median reserved for rapid transit or high-speed bus lanes intended to connect Los Angeles International Airport on the west with Interstate 605 in the City of Downey on the east. It would traverse approximately 17 miles through nine separate cities. Federal jurisdiction over the California Highway Commission was alleged to rest upon the doctrine of pendent jurisdiction and the provisions of 28 U.S.C. 2201 (R.A., pp. 3-6).

Eleven public hearings were held between 1963 and 1970 with total attendance of more than ten thousand. They were divided between corridor hearings (also called "location" hearings) and design hearings. The former were held on June 5, 1963; August 13, 1965; March 30, 1967; and April 16, 1968. The latter were held on June 24, 1969; July 8, 1969; September 17, 1969; October 15, 1969; January 28, 1970; April 22, 1970; and May 13, 1970. On August 23, 1968, 23 U.S.C. 128 was amended to require that in addition to consideration of the *economic* effects, a state highway department must consider the ". . . social effect of such a location, its impact on the environment and its con-

sistency with the goals and objectives of such urban planning as has been promulgated by the community." During this same time period the Federal Highway Administration issued Policy and Procedure Memorandum 20-8 (January 17, 1969) and NEPA became effective on January 1, 1970.

The Department of Transportation issued Guidelines for Implementation of NEPA, PPM 90-1, August 24, 1971, establishing regulations governing preparation of Environmental Impact Statements for projects commenced prior to NEPA. Under paragraph 5(b) thereof, Interstate 105 was reassessed and it was concluded that an EIS was not required.

During this period, and on the strength of those public hearings and "location" and "design" approvals by the Federal Highway Administration (hereinafter FHWA), petitioner commenced acquisition of needed right of way. It made agreements with the separate cities which, in turn, adjusted their public services, transportation plans and financing to accommodate Interstate 105. Well over $88 million worth of right of way was acquired at state expense. The combination of acquisition and clearance left a severe impact on corridor cities when the district court issued its preliminary injunction on July 7, 1972. Petitioner had not yet sought Federal approval of its plans, specifications and estimates (hereinafter PS and E approval).

In the opinion accompanying the injunction the district court found no deficiencies in the hearings (352 Fed. Supp. 1339, 1340). Rather, it divined a shortcoming *not* raised by *any* participant at *any* hearing: insufficient consideration of noise and air pollution. Coupling that with the strong policy statement in NEPA, it re-

quired that *all* "corridor" and "design" hearings be repeated. Further, it required those hearings to be used as a forum to redetermine the "need for" the project. Additionally, it ordered compliance with NEPA, CEQA (California Environmental Quality Act, Cal. Pub. Res. Code §21000 *et seq.*), new studies of replacement housing, and specific project assurances to FHWA of its availability.

State defendant appealed. As an administrative concession to expedition and not the correctness of the district court's reasoning, the State and Federal defendants commenced preparation of an Environmental Impact Statement to comply with NEPA and CEQA. Nevertheless, and contrary to the opinions of the Circuit Court herein, all issues were before the Circuit Court.

By its December 4, 1973, opinion the circuit court reversed the district court, holding that new "corridor" and "design" hearings were not required (Appendix "A").

The latest opinion in *Keith,* relying upon *Lathan,* rejected the clear intent of NEPA that *further* major federal actions be shaped to minimize their impact on the environment. It did this by erroneously establishing PS and E approval as the only *major* federal action, ignoring the scheme of federal-state cooperation in the planning and construction of Federal Aid Highways. It then relied on NEPA to buttress its erroneous conclusion.

California Highway Commission files this petition *not* out of any desire to avoid compliance with NEPA or escape full public participation in the decision-making process. Those are assured by the medium of the draft environmental impact statements and anticipated public meetings.

Rather, it is filed in the belief that the *Keith* and *Lathan* opinions of which review herein is sought are contrary to established authority and could jeopardize the scheme of federal-state cooperation employed by Congress to achieve its objectives.

F. REASONS FOR GRANTING THE WRIT.

I.

Certiorari Must Issue to Disapprove the Simplistic Formula Used by Lathan and Keith for Implementation of NEPA, and End Conflict With Controlling Authority Throughout the Nation, and Particularly Within the Ninth Circuit.

Central issues presented to the Ninth Circuit in *Lathan* and *Keith* were: (1) The extent to which NEPA applied to projects substantially under way prior to its effective date; (2) The degree to which NEPA should be applied to actions taken before and after its effective date.

Ignoring different approaches taken by other circuits it held:

1. There is no Federal "commitment" to an interstate highway until a state seeks, and the Federal government gives, approval of plans, specifications and estimates, pursuant to 23 U.S.C. 106(a), and starts construction.

2. If that "commitment" occurs after enactment of NEPA, *it* becomes the major Federal action having a significant effect on the environment, making NEPA applicable to all *prior* state actions.

3. Each state and federal action taken prior to the "federal commitment", regardless of its date, is to be tested by the laws and regulations *in effect* at time of the "commitment."

4. Corridor and design hearings held before the 1968 amendment of 23 U.S.C. 128(a), between that date and the 1970 enactment of NEPA, and subsequent thereto are presumed invalid.

5. Review of compliance with NEPA is tested for procedural compliance under 5 U.S.C. 706(2)(D) as opposed to substantive compliance under 706(2)(A).

Cases reviewing the questions have taken four approaches. The Second and Fourth Circuits applied an equitable balancing test to govern application of Congress' concern for the environment in NEPA and amendment of 128(a), applying them only ". . . if the cost of altering or abandoning . . . would not certainly outweigh whatever benefits might be derived . . ." from a NEPA reassessment. *Arlington Coalition on Transportation v. Volpe* (4th Cir. 1971) 458 F.2d 1323, 1337, cert. den. 409 U.S. 1000; *cf. Movement Against Destruction v. Volpe* (4th Cir. 1974) 499 F.2d 29 affirming *Movement Against Destruction v. Volpe,* 361 Fed. Supp. 1360, 1389-1391; *Monroe County Conservation Council, Inc. v. Volpe* (2nd Cir. 1972) 472 F.2d 693, 701.

A second line of cases looks to *prospective* agency compliance, holding that expressions of concern for the environment in NEPA, in the amendment of 23 U.S.C. 128(a) and in PPM 20-8 not retroactive. These authorities require *further* major actions be shaped to minimize their impact on the environment. This accords with this court's view in *United States v. SCRAP,* 412 U.S. 669, *infra,* and with the view of the Council on Environmental Quality, 38 Fed. Reg. 20555-20556 (8-1-73) §1500.13; (see also 23 C.F.R. §1.38, Appendix A, 5). *Township of Hopewell v. Volpe* (3rd Cir. 1971) 446 F.2d 167, 172; *Township of Hopewell v. Volpe*

(3rd Cir. 1973) 482 F.2d 376, 379; *Wildlife Preserves, Inc. v. Volpe* (3rd Cir. 1971) 443 F.2d 1273, 1275-1277; *Jicarilla Apache Tribe v. Morton* (9th Cir. 1973) 471 F.2d 1275, 1284; *Citizens Environmental Council v. Volpe* (10th Cir. 1973) 484 F.2d 870, 873, cert. den. 42 U.S.L.W. 3584; *Environmental Defense Fund v. Froehlke* (8th Cir. 1973) 477 F.2d 1033; *Swain v. Brinegar* (D.C.S.C. Ill.) 378 Fed. Supp. 753.

A third group looks for a "peg" upon which to test compliance with NEPA. If the Secretary of Transportation issues his design approval prior to NEPA, the entire project need not be reassessed. *Robinswood Community Club v. Volpe* (9th Cir. 1974) .... F.2d .... (mandate stayed), reported at 5 ELR 20378, 6 ERC 1401; *Citizens of Marlboro v. Volpe* (3rd Cir. 1972) 459 F.2d 332, 335; *Pennsylvania Environmental Council, Inc. v. Bartlett* (3rd Cir. 1971) 454 F.2d 613, 618-619.

Finally, some circuits rely on equitable doctrines of laches, *Ragland v. Muller* (5th Cir. 1972) 460 F.2d 1196; *Lathan v. Volpe* (9th Cir. 1971) 455 F.2d 1111, 1122; *Clark v. Volpe* (5th Cir. 1972) 461 F. 2d 1266, affirming 342 Fed. Supp. 1324.

The conflict of *Keith* and *Lathan* with *prior* Ninth Circuit opinions is even more pronounced:

LaRaza Unida v. Volpe, 488 F.2d 559 holds that there is Federal commitment on program submission. These cases are *contra.*

The first *Lathan* decision, *Lathan v. Volpe,* 455 F.2d 1111, holds that there are five specific *major* Federal actions affecting the environment in a Highway project. This delineation has been uniformly followed in all circuits. These cases are *contra.*

Jicarilla, supra, holds actions prior to NEPA need not be redone and that future actions may be tailored by proper prospective decisions of the administrator. These cases are *contra.*

San Francisco Tomorrow v. Romney, 472 F.2d 1021, 1024-1026 eschews retroactive application of NEPA, yet concludes that a mere *agreement to change* the West Berkeley Project after NEPA was a major federal action. *Cf. Robinswood, supra. Lathan* and *Keith, supra,* are *contra.*

In short, these cases eviscerate all decisions relating to ongoing projects and those pertaining to intermediate steps in new or old projects. It holds, contrarily, that there is only one federal action upon which environmental and participating action hinges—the last act possible in Federal approval.

The California Highway Commission (and also FHWA) was attempting to comply with the second category of authority noted above prior to the July 1972 injunction. A good faith effort was under way to forge future major actions pursuant to NEPA.

In each of these four lines of authority, questions of compliance with hearing statutes [23 U.S.C. 128(a)] were judged independently on the basis of *facts* before the court. The district court in *Keith* required new 128(a) hearings. It found compliance with the law as it then existed, but concluded *in its view* insufficient consideration was given to noise and air pollution. Ninth Circuit opinions in *Lathan* and *Keith* go beyond that tenuous conclusion to hold that no hearing, or other action, is valid unless it complies with whatever law and regulations may be in effect in the future when the final federal approval is sought. Clearly, that

imputes to NEPA the power to *sub silentio* repeal other statutes. That concept was disapproved in *United States v. SCRAP.*

Moreover, the opinion below implies that there need be no compliance with the policies of NEPA until the last act of Federal approval in a joint Federal-State project. This simplistic formula deviates from all reported cases. It vitiates the policy of NEPA because uncertain future standards of NEPA cannot be complied with during planning stages. Assured compliance can occur *only* at the last Federal Act.

II.

A Critical Question Involving Federal-State Cooperation Is Presented and Should Command This Court's Attention.

Keith and *Lathan* dealt with Highway projects and only those under way or substantially completed on the effective date of NEPA. The Ninth Circuit opinions go beyond these issues and will apply to all Federal-State joint endeavors regardless of the time of their conception.

Four types of highways were made eligible for federal participation by the Federal-Aid Highway Act of 1973: the primary system, the urban system, the secondary system and the Interstate System. Both *Keith* and *Lathan* concern Interstate System highways, eligible for 90% federal financing, but can be applied to any federal aid highway.

Congress declared in 1973: ". . . the prompt and early completion of the National System of Interstate and Defense Highways . . . (is) . . . essential to the national interest and . . . one of the most important objectives of this Act." Federal-Aid Highway Act of 1973; 23 U.S.C. 101(b).

It authorized a $20 billion expenditure to complete the 41,000-mile Federal Aid Interstate Highway System by 1979, completing a $76.3 billion system commenced in 1956. H.R. 93-118, P.L. 93-87, 8 U.S. Code Congressional and Administrative News 2612-2614. It chose the mechanism of close federal-state cooperation as the means.

That cooperation in planning has five distinct stages (*Lathan v. Volpe*, 455 F.2d 1111). The FHWA first approves inclusion of the *project* in the Interstate System. Second, it approves the State's program for completion of the project. Then the State selects the precise corridor or location of the project (23 C.F.R. 790.3(a), App. "E") after public hearings; FHWA gives its corridor or location approval. Precise design features are prepared by the State and presented at "design" hearings (23 C.F.R. 790.3(b), App. "E" hereto). Federal design approval is then given, authorizing purchase of needed right of way. State-prepared plans, specifications and estimates are then submitted to FHWA for approval. Regardless of the size or scope of a "project," PS&E approval is the last and final step in this chain of major federal actions prior to ultimate construction of such federal-state project.

Federal-state cooperation is also the means employed to *finance* the Interstate System. One *option* available to a state is to advance *its* funds through the first four of the five steps and obtain federal reimbursement at PS&E approval. Another permits federal funding of right of right-of-way acquisition and payment of relocation expenses (23 U.S.C. 108(a), (c)(2)). Administrative expenses during the five-step process can also be advanced to the states. Typically, completion of the five-step cooperative process takes ten or more years.

A state looking to ultimate federal participation can and should comply with the extremely important policies expressed in NEPA. It must comply with the imperative of public participation. *Keith* demonstrates petitioner's compliance with those policies. Petitioner, California Highway Commission, complied with FHWA guidelines for implementation of NEPA (paragraph 5b, PPM 90-1, 23 C.F.R. 1.38, App. "A") in addition to a pre-NEPA study of project impacts conducted by retained engineering consultants. It nevertheless undertook a two-year study of environmental impacts under NEPA including a careful assessment of the impacts of abandonment. Public participation through corridor and design hearings complied with and exceeded applicable statutes and regulations, and the district court so found (footnote 7, App. "A").

Yet on a theory not raised, briefed or argued by any party, *Lathan* and *Keith* require state compliance with federal statutes and regulations at that mythical point in time when the federal agency becomes "committed" to the project, and worse, that commitment occurs only after the last act of approval by the federal government.

Lathan and *Keith* jeopardize that process. They hold that this partnership does not exist until the last act of federal approval because there is no federal "commitment" until then.

This same Circuit held a state is committed to ever-changing federal statutes and regulations by the mere *anticipation* of federal funds in the future. *LaRaza Unida v. Volpe* (9th Cir. 1973) 488 F.2d 559, cert. den. 409 U.S. 890. Indeed, *an act of Congress* is required to extract a state from that commitment. Section

154 of the Highway Act of 1973, P.L. 93-87, for example, terminates the federal-state relationship on the oft litigated San Antonio North Expressway. *San Antonio Conservation Society v. Texas* (5th Cir. 1974) .... F.2d .... acknowledged the power of Congress to do so.

What state highway agency would embark on that lengthy process, committing its resources on the slender hope that no statute or regulation affecting its performance would be altered before it sought approval of its Plans, Specifications and Estimates?

Lathan and *Keith* will cut across a wide range of cooperative federal-state ventures and, are not limited by the peculiarities of federal-state cooperation in the highway program. Congress has employed similar federal-state partnerships in implementing many of its policies, culminating in federal agency approval and reimbursement. It can be expected to do so in the future.

A state intending to use *its* resources in anticipation of a federal monetary "commitment", is now faced with equally unsatisfactory alternatives. It may set out to carefully assess the environmental consequences of its action, seek maximum public participation and carefully coordinate planning of the facility with affected counties and cities. This lengthy process invokes the huge risk of a change in statute or regulation prior to federal "commitment." Pursuant to the opinions below if such change occurs all that has gone before is nullified and thereafter void.

The other alternative is to furtively plan its project, compressing EIS preparation, cooperative planning and public participation in the shortest possible time prior to federal commitment to minimize that risk.

Neither alternative was intended by Congress. The first would prolong projects forever through constant *recompliance* or abort them through fear of such great financial drain and loss. The second would totally destroy the policy of NEPA.

III.

Lathan and Keith Are Contrary to United States v. SCRAP, and Congressional and Regulatory Enactments Intended to Insure Compliance With NEPA.

This court recently stated "The statutory language in fact indicates that NEPA was not intended to repeal by implication any other statute." *United States v. SCRAP* (1973) 412 U.S. 669, 694-696.

Congress has enacted "other statutes" governing the Federal Aid Highway Program. Paramount is 23 U.S.C. 109(h)(i) (added by P.L. 91-605, 1970, set forth in App. "E") requiring the Secretary of Transportation to issue guidelines properly balancing between ". . . the need for fast, safe and efficient transportation" and environmental concerns for ". . . all projects with respect to which plans, specifications and estimates are approved after the issuance of such guidelines." The Secretary responded with regulations now at 23 C.F.R. 1.38, Appendix "A" (PPM 20-4, 90-1), 23 C.F.R. Parts 772 (noise standards), 790 (Public Hearings) and 795 (Action Plan—Process Guidelines), contained, in part, in Appendix "E".

An unchallenged reassessment was made of the Century Freeway concluding an Environmental Impact Statement was not required, pursuant to paragraph 5b, of PPM 90-1. The *guideline, not the reassessment,* was thrown out by the District Court as an emasculation of NEPA (352 Fed. Supp. at 1333, footnote 9).

Public hearings were held pursuant to 23 U.S.C. 128 (a) and PPM 20-8 (now 23 C.F.R. 790, (2)(1), (b)(1)) and found sufficient, yet ordered anew because the district court, not the public, wanted "need for" the project redetermined by the public *solely* on the basis of any noise or air quality impact. Housing studies and project assurances were ordered repeated on a finding that plaintiffs' evidence was "unconvincing", "meager," and "skimpy" (352 Fed. Supp. 1344-1346) because it was a NEPA case (352 Fed. Supp. 1350).

The Ninth Circuit concurred for the reason that there has not yet been PS and E approval. These conclusions fly in the face of 23 U.S.C. 109 and its following regulations. 23 U.S.C. 109(h) implicitly allows PS&E approval prior to July 1972 without compliance with its provisions. 23 U.S.C. 109(i) does two things; it recognizes location approval as a Federal commitment, and it exempts projects having such approval prior to July 1972 (the project here in question) from compliance with noise standards adopted by the Secretary of Transportation.

Petitioner complied with statutes and regulations applicable to *it*, only to have its performance set aside by the district court on the basis of an *implied* repeal of those statutes and regulations by enactment of NEPA. The Ninth Circuit opinions in *Keith* and *Lathan* ignore this court's disapproval of "implied repeal" and reach an even more contrary result. By falsely characterizing the contractual commitment of funds as the "major

federal action", ignoring the *years* of federal participation that precede that point, it even more drastically departed from this court's announcement in *United States v. SCRAP, supra.*

The district court voided valid hearings on *its* view of what the law *should* be. The Ninth Circuit went further, holding that hearings can *only* be valid if they comply with unknown laws and regulations at some uncertain time in the future.

IV.

If the Ninth Circuit Court Opinions in Keith and Lathan Are Correct Statements of the Law, There Can Be No Injunction Herein.

If the opinion below is the law, it becomes clear, contrary to all other reported decisions that there is only one *major* Federal action in a joint Federal-State project. That is final Federal approval of the project (PS&E approval). If this be true, then there can be no violation of NEPA to be enjoined prior to that act.

No court can determine that a violation of NEPA is even threatened until the project is submitted for PS&E approval. First, under the Federal Highway Act PS&E approval cannot occur until it is requested. It is axiomatic that until it is requested it cannot threaten. Secondly, until the act of PS&E approval is about to occur (and *after* its request) no trial court could begin to guess what the law might or might not require at such time of occurrence.

Contrary to the opinion below petitioner has appealed at all stages the validity of the entire injunction herein. Under the opinion below there can be no violation or threatened violation of Federal law in this case so the injunction should be vacated.

Dated: October 29, 1974.

Respectfully submitted,

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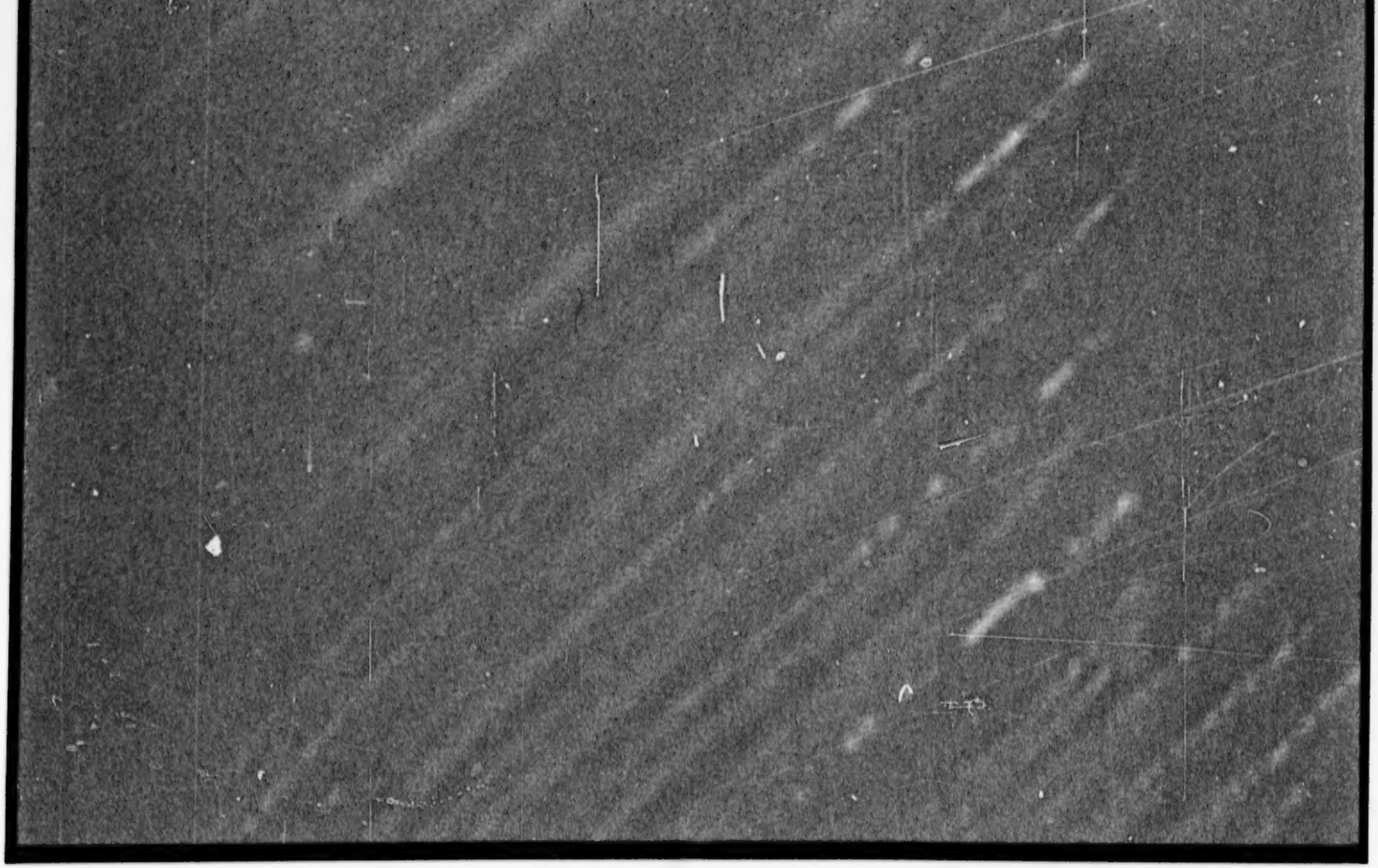

APPENDIX "A."

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RALPH W. KEITH and ESTHER MAY KEITH, husband and wife, et al.,

Plaintiffs-Appellees,

vs.

CALIFORNIA HIGHWAY COMMISSION, DEPARTMENT OF PUBLIC WORKS, JAMES A. MOE, individually and in his capacity as Director of California Department of Public Works, and ROBERT DATEL, individually and as State Highway Engineer, California Division of Highways, California Department of Public Works,

Defendants-Appellants.

RALPH W. KEITH and ESTHER MAY KEITH, husband and wife, et al.,

Plaintiffs-Appellees,

vs.

JOHN A. VOLPE, as Secretary of Transportation; SHERIDAN A. FARIN, as Administrator for Region 7, Federal Highway Administration, Department of Transportation; DONALD E. TRULL, as Division Engineer, Federal Highway Administration, Department of Transportation,

Defendants-Appellants.

No. 72-3072

[December 3, 1973]

Appeal from the United States District Court
for the Central District of California

OPINION

Before: HAMLEY and CHOY, Circuit Judges, and
SMITH,* District Judge

SMITH, District Judge:

The Century Freeway is a 17-mile section of interstate highway which, if constructed, will cross the southern portion of the densely populated Los Angeles basin. The district court on the petition of plaintiffs, interested individuals, associations, and corporations, enjoined all further activity (with some expressly permitted exceptions) in furtherance of the freeway until:

(a) The federal defendants (appropriate federal officials) comply with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321-4347) (hereinafter NEPA).

(b) State defendants (appropriate departments and officials of the State of California) comply with the requirements of the California Environmental Quality Act of 1970 (West's Ann. Cal. Public Resources Code §§ 21000-21151 (1970)) (hereinafter CEQA).

(c) State defendants certify to Defendant Volpe that they have held, or provided the opportunity for, additional public hearings on the Century Freeway, which hearings shall focus on the effect of the freeway on air and noise pollution in accordance with § 128(a) of the Federal Aid Highway Act (23 U.S.C. § 128(a)) and PPM 20-8, 23 C.F.R. Part 1, App. A (Jan. 1, 1972, Revision).

(d) State defendants submit to federal defendants the specific project assurances required by Par. 7(b) of IM 80-1-71, 23 C.F.R. Part 1, App. A (Jan. 1, 1972, Revision).

(e) State defendants submit to the Federal Highway Administration and said Administration approves additional housing availability studies.

This appeal, which is prosecuted by the California defendants alone, presents no problems as to the propriety of conditions (a),

*The Honorable Russell E. Smith, Chief Judge of the United States District Court for the District of Montana, sitting by designation.

(b), (d), and (e) of the court's injunctive order. It does pose problems as to the propriety of condition (e) and as to the breadth of the injunction which was granted. We proceed to an examination of those problems.

The building of any section of federally-funded roadway involves a series of stages. *See Lathan v. Volpe*, 455 F.2d 1111 (9th Cir. 1971). We are here concerned with the "routing" and "engineering design" stages in which the state prepares and submits for approval of the Secretary of Transportation such surveys, plans, specifications, and estimates as relate to each stage. 23 U.S.C. § 106(a).

23 U.S.C. § 128(a)[1] provides that any state highway department which submits plans for a federal-aid highway project involving the "going through" of any city shall certify to the Secretary that it has held public hearings and has considered the effect of such location. As originally enacted (Act of Aug. 27, 1958, Pub. L. No. 85-767, 72 Stat. 902) this section required only that the "economic" effects of such highway location be considered. The amended version of this section (Act of Aug. 23, 1968, Pub. L. No. 90-495 § 24, 82 Stat. 828) (hereinafter amended Federal Highway Act) now provides that in addition to the economic effects of such location, these hearings should also consider its "social effect . . . , its impact on

[1]"Public hearings

"(a) Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such highway. Such certification shall be accompanied by a report which indicates the consideration given to the economic, social, environmental, and other effects of the plan or highway location or design and various alternatives which were raised during the hearing or which were otherwise considered."

the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community." This statute has been interpreted by the Department of Transportation as requiring two public hearings on a highway "going through" a city; one for the location of the route, i.e., "a corridor public hearing," and one concerning the design, i.e., "a design public hearing." *See* PPM 20-8, 23 C.F.R. App. A (Jan. 1, 1972, Revision).[2]

The facts relative to the Century Freeway "corridor" hearings are these: All hearings had been held by the end of April 1968. The location of the western portion of the freeway was approved by the Department of Transportation in April 1968. In July 1968 the California Highway Commission approved the location of the eastern portion of the corridor. Federal approval followed in October 68. It appears, then, that all of the location hearings and approvals had been completed prior to January 1, 1970, the effective date of NEPA, but that the federal location approval of the eastern portion followed the enactment on August 23, 1968, of the amended Federal Highway Act. The locations were fully approved prior to the effective date (January 17, 1969) of PPM 20-8. The location hearings did comply with the law and the regulations in effect at the time they were held and at the time they were submitted for approval.

A problem is posed: Did the amended Federal Highway Act, effective August 23, 1968, by itself, or taken in conjunction with NEPA, effective January 1, 1970, operate retroactively to require that that which had been lawfully done prior to the enactment of either act be redone? The rule is that civil statutes are presumed to operate prospectively and will be applied retroactively only if it can be found that Congress has clearly and unambiguously indicated its intention to make the statute retroactive.[3] The trial court did not consider the problem of retroactivity as such but did hold that the language of 42 U.S.C. § 4332, "[t]he Congress authorizes

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[2]The citation is to the Policy and Procedure Memorandum effective at the time of the entry of the preliminary injunction in this case.

[3]*Greene v. United States*, 376 U.S. 149 (1964; *Hassett v. Welch*, 303 U.S. 303 (1938); *United States v. Perry*, 431 F.2d 1020 (9th Cir. 1970).

and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policy set forth in this chapter," compelled the conclusion that new corridor hearings were required. This result is supported by the decisions in *Arlington Coalition on Transportation v. Volpe,* 458 F.2d 1323 (4th Cir. 1972), *Monroe County Conservation Council, Inc. v. Volpe,* 472 F.2d 693 (2d Cir. 1972),[4] and *D.C. Federation of Civic Associations, Inc. v. Volpe,* 434 F.2d 436 (D.C. Cir. 1970) (MacKinnon, J., dissenting). *Contra, Township of Hopewell v. Volpe,* 446 F.2d 167 (3d Cir. 1971).

Examining the amended Federal Highway Act separately and in conjunction with NEPA we do not find that unambiguous indication of congressional intent necessary to retroactivity. There is nothing in the language of the amended Federal Highway Act which indicates a congressional intent that it should be given retroactive effect. In the enactment of NEPA Congress did not use any language suggesting the retroactivity of the amended Federal Highway Act. It appears from the location approvals granted and from the regulations that the interpretation of the highway administrator, which is entitled to some weight, was against retroactivity.[5]

The amended Federal Highway Act required hearings on the economic, social, and environmental impacts of federal highways. Certainly it could not be the purpose of NEPA (concerned only with the environment) to make the amended Federal Highway Act

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[4]In *Monroe County Conservation Council, Inc. v. Volpe,* 472 F.2d 693 (2d Cir. 1972), the court made the requirement for new hearings turn upon the date of federal approval. We see no purpose in this. The law in question imposed a duty on state highway departments. We think that the adequacy of the performance of the duty should be judged by the law in effect when the duty was performed. We do not think that a state's duty should be made to depend upon the "in-basket" and "out-basket" flow in a federal bureau unless Congress expressly says so.

[5]PPM 20-8, par. 6(d) provides with respect to projects which had had location approval prior to PPM 20-8 that new hearings were required only under circumstances not relevant here. *See Triangle Improvement Council v. Ritchie,* 314 F. Supp. 20 (S.D. W.Va. 1969), *aff'd,* 429 F.2d 423 (4th Cir. 1970), *cert. dismissed as improvidently granted,* 402 U.S. 497 (1971).

retroactive so as to require new social and economic impact hearings. If Congress intended that NEPA give the amended Federal Highway Act a partial retroactivity to preserve the environmental hearing requirements of that Act, why was such a simple intention buried in a statement of general policy rather than expressly stated? Can it be fairly inferred that Congress, which did not in NEPA require mandatory hearings,[6] did by enacting NEPA disclose an unambiguous intention to make hearings mandatory in federal highway projects as distinguished from other federal projects by giving retroactivity to the amended Federal Highway Act, which Act did not provide for its own retroactivity? Can it be fairly inferred that NEPA, which is directed to federal rather than state agencies, makes retroactive that portion of the amended Federal Highway Act which is directed to the duties of state agencies? We think not.

The district court required that new design hearings be held. The facts relative to the design hearings are these:

The State defendants divided the Century Freeway into eight segments for the purpose of planning the highway design and securing Federal Highway Administration approval. The design of one segment was approved on August 14, 1968. Our reasons for holding that the amended Federal Highway Act was not retroactive so as to require new corridor hearings lead us to the conclusion that neither it nor PPM 20-8 were retroactive as to design hearings. Design hearings for the remaining seven segments were held between June 24, 1969, and May 13, 1970. The following discussion applies only to the seven design hearings held after the effective date of PPM 20-8.

There was a full compliance with the amended Federal Highway Act. Public hearings were held and the reports filed did indicate "the consideration given to the economic, social, environmental and other effects of the plan or highway location or design and various alternatives which *were raised during the hearing* or which were otherwise considered." (Emphasis supplied.) *See* note 1, *supra.*

The district court recognized the fact that hearings had been held and that there had been some consideration given to environmental problems but decided that there had been an insufficient compliance

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[6]*Jicarilla Apache Tribe v. Morton,* 471 F.2d 1275 (9th Cir. 1973).

with PPM 20-8 because little information about the problem of air and noise pollution was made available to the public.[7]

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[7]The district court said in its original opinion *(Keith v. Volpe,* 352 F.Supp 1324 (C.D.Cal. 1972)) at page 1339:

> Having examined the transcripts of the hearings and the reports on the hearings submitted to the FHWA by the state defendants, the Court is not prepared to say that the hearings were totally inadequate in their consideration of the relevant social, economic, and environmental effects, nor that they provided an inadequate "public forum * * * for presenting views" on alternate locations and designs for the freeway. The hearings may not have been ideal, but as paragraph 4c of PPM 20-8 recognizes, each possible social, economic, or environmental effect need not necessarily "be given equal weight in making a determination upon a particular highway location or design." Nevertheless, the transcripts and the reports reveal that very little consideration was given to one of the most important of the Century Freeway's effects—*i.e.,* its effect on noise and air pollution. This effect is so crucial and the consideration given to it so minimal that the Court believes that further work on the freeway should be enjoined until the state defendants certify to the FHWA that they have held, or have provided an opportunity for, new public hearings focusing on the likely effect of the freeway on air and noise pollution.

Later, in its decision on a motion to amend the preliminary injunction the court said at page 1353:

> The Court believes that the public hearing requirement is broader in scope than the federal defendants contend. The state highway authorities must do more than merely permit members of the public to come to an auditorium and express whatever concerns they might have at the time. PPM 20-8, 23 C.F.R. Part 1, Appendix A, which implements Section 128(a), imposes upon the state authorities the responsibility to provide people who attend public hearings with information about the alternatives that exist. Paragraph 8a(3) of PPM 20-8 provides that the state highway authorities must notify the public, in advance of hearings, that "maps, drawings, and other pertinent information developed by the State highway department * * * will be available for public inspection and copying" prior to the public hearings. Paragraph 8b(3) of PPM 20-8 provides,
>
> "At each required corridor public hearing, pertinent information about location alternatives studied by the State highway department shall be made available. At each required highway design public hearing information about design alternatives studied by the State highway department shall be made available."
>
> The state defendants did not meet their obligations by simply convening hearings. Air and noise pollution is one of the social,

In our opinion the district court imposed a burden on the defendants not required by the law or regulations. We start with the proposition that the building of highways is a function of the executive, subject to court control only when the executive acts contrary to the Constitution, the Acts of Congress, or its own regulations. We look, therefore, to the amended Federal Highway Act and the regulations to ascertain the duties of the Federal Highway Administration and the State defendants.

Insofar as the amended Federal Highway Act is concerned we find a congressional intent to provide a public forum and nothing more. If the public, afforded the right to a hearing, is apathetic enough not to request one, then there need be none. This indicates to us that Congress placed the duty of going forward at the hearing upon the public. There is no suggestion in the Act that the concerned agencies were required to conduct an educational campaign or gather source material for the debate.

The regulation, PPM 20-8, required more. Paragraph 8a(3) does require that the state highway authority notify the public in advance of the hearings, that "maps, drawings, and other pertinent information *developed* by the State highway department . . . will be available for public inspection and copying" prior to the hearings. (Emphasis supplied.) PPM 20-8, par. b(3) does require that at the public design hearing information about "design alternatives *studied* by the State highway department shall be made available." (Emphasis supplied.)

We think the fair import of PPM 20-8 is that the highway department reveal what it has studied, what it has developed, and what alternatives have been considered so that the public may know the route and principal design features of the highway and at the public hearing make known their views as to any effect that the

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economic, and environmental effects listed in paragraph 4c of PPM 20-8; information about the problem clearly is pertinent to the consideration of the design alternatives that are available on a given freeway project. The consideration given to air and noise pollution at the design hearings on the Century Freeway was inadequate not because the members of the public in attendance expressed little interest in the problem, but because little information about the problem was made available to the public. Therefore additional design hearings are appropriate.

highway may have. We do not believe that it can be construed to require highway departments to develop any given quantity of information about the 23 effects[8] mentioned in PPM 20-8, par. 4(c), before a valid design hearing may be held. We do not review the highway department's obligation, political in nature, intelligently to consider all the effects that a proposed action may have. We are considering only what is required to be done to fulfill the requirement for a public hearing.[9] It may be that in any given case inade-

[8]These are:

"(1) Fast, safe and efficient transportation.
(2) National defense.
(3) Economic activity.
(4) Employment.
(5) Recreation and parks.
(6) Fire protection.
(7) Aesthetics.
(8) Public utilities.
(9) Public health and safety.
(10) Residential and neighborhood character and location.
(11) Religious institutions and practices.
(12) Conduct and financing of Government (including effect on local tax base and social service costs).
(13) Conservation (including erosion, sedimentation, wildlife and general ecology of the area).
(14) Natural and historic landmarks.
(15) Noise, and air and water pollution.
(16) Property values.
(17) Multiple use of space.
(18) Replacement housing.
(19) Education (including disruption of school district operations).
(20) Displacement of families and businesses.
(21) Engineering, right-of-way and construction costs of the project and related facilities.
(22) Maintenance and operating costs of the project and related facilities.
(23) Operation and use of existing highway facilities and other transportation facilities during construction and after completion.
This list of effects is not meant to be exclusive, nor does it mean that each effect considered must be given equal weight in making a determination upon a particular highway location or design."
PPM 20-8, par. 4(c)

[9]We note PPM 20-8, par. 6(a) requires only that "a public hearing must be held or an opportunity afforded" and that whether there be a hearing or not the Federal Highway Administrator is required to review the obligation of the state to do adequate planning.

quate information will be developed on one or more of the effects of the proposed federal highway. It may be that in some instance the effect of the highway on historic landmarks will be completely ignored. In that case the prehearing planning would be poor, but it does not appear to us that deficiencies in planning should vitiate a hearing, the purpose of which is to reveal those deficiencies. In short, we think that what is required is that the highway department reveal what it has planned and that at a public hearing the public be given an opportunity to tell the highway department why what has been planned should be abandoned or changed because of the evil effect which would flow from it.[10]

It may be that the compliance with NEPA and CEQA required by the decree will reveal such deficiencies in the location and design planning in light of the environmental impacts that the Century Freeway project must be abandoned or the location and design substantially altered, but we are of the opinion that neither new corridor nor design hearings are required by NEPA, the amended Federal Highway Act, or PPM 20-8.[11]

We see no merit in the argument made with respect to the breadth of the injunction. *See Lathan v. Volpe, supra.*

The case is remanded to the district court for further proceedings not inconsistent herewith.

HAMLEY, Circuit Judge (Dissenting):

I respectfully dissent. After lengthy hearings, the district court wrote a thoroughly documented twenty-nine page opinion (352 F.Supp. 1324 (C.D. Cal. 1972)), dealing with all of the issues in this case, including the necessity of new design and corridor hearings. I agree with the conclusions reached by the district court.

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[10]It should be noted here that we are considering only the requirements of PPM 20-8 which is directed to the State defendants. Even though NEPA was effective prior to three of the design hearings it placed no duty on the State defendants. CEQA places a duty upon the California defendants to study environmental effects but it was not effective until September 18, 1970, after the hearings had been held.

[11]We do not intimate that if, as a result of the NEPA or CEQA studies changes in location or design are thought to be required to be made, additional public hearings would not then be necessary.

Design Hearings

The district court's determination that new design hearings were necessary was predicated upon the fact that, but for one segment of the Century Freeway, the State's design hearings were held after the amendment of section 128(a) of the Federal-Aid Highway Act, 23 U.S.C. § 128(a), on August 23, 1968. Prior to this amendment, section 128(a) required only that the State hold public hearings to consider the "economic effects" of constructing the proposed freeway. Under the amendment, however, the State was required to hold public hearings to consider the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community.

As the district court pointed out, regulations prepared by the Federal Highway Administration (FHWA) pursuant to amended section 128(a), clarify the basic statutory requirements. *See* PPM 20-8, 23 C.F.R., Part I, App. A. Under these regulations, State highway authorities are required to hold two sets of hearings: first, a "corridor public hearing," and second, a "highway design public hearing." Paragraph 4c of PPM 20-8 lists twenty-three possible "social, economic, and environmental effects" that are relevant to the selection of routes and designs for proposed highways. The fifteenth of these possible effects is: "(15) Noise, and air and water pollution."

The district court, after examining the transcripts of the hearings and the reports on the hearings submitted to the FHWA by the state defendants, concluded that very little consideration had been given to the effect of the Century Freeway on noise and air pollution. This led the district court to state:

> "This effect [of noise and air pollution] is so crucial and the consideration given to it so minimal that the Court believes that further work on the freeway should be enjoined until the state defendants certify to the FHWA that they have held, or have provided an opportunity for, new public hearings focusing on the likely effect of the freeway on air and noise pollution." 352 F.Supp. at 1339.

In rejecting this district court view, the majority construes section 128(a) and PPM 20-8 as requiring only that the State provide

an opportunity for a public hearing and, if one is demanded, that the State need make available to the public only the data actually considered by the State. According to this view, if the State has given minimal consideration to particular social, economic and environmental effects, it need only so indicate. The duty of providing additional relevant data regarding possible adverse effects of the proposed project, the majority holds, lies with the public.

It seems to me this view of the State's duties regarding public hearings is inconsistent with the express language of PPM 20-8. The regulation "requires State highway departments to consider *fully* a wide range of factors in determining highway locations and highway designs." PPM 20-8, par. 1. (Emphasis added.) One of the factors which must be given full consideration is the possible effect on noise and air pollution. PPM 20-8, par. 4(c)(15). The regulation requires that this factor be fully considered, not merely that it be given some passing consideration, as the majority seems to suggest.

The hearing procedures established by PPM 20-8 "are intended to afford full opportunity for *effective* public participation in the consideration of highway location and design proposals. . . ." PPM 20-8, par. 1. (Emphasis added.) To accomplish this end, the State must make available to the public "maps, drawings and other pertinent information developed by the State highway department" regarding its design proposals. PPM 20-8, par. 8(a)(3). The majority emphasizes that this latter requirement extends only to such pertinent information as is actually developed by the State highway department. But this ignores the fact that the State has an obligation to develop that quantity of information necessary for full consideration of noise and air pollution effects.

In my opinion, PPM 20-8 does, therefore, place on the State the duty of developing the information necessary for full consideration of the possible effects of the proposed freeway on noise and air pollution. That information must then be made available to the public for consideration at a public hearing.

The majority would separate the question of the adequacy of the hearings from the question of whether the State has fulfilled its obligation "intelligently to consider all the effects that a proposed action may have." In my view, the questions are not separable. If the State has failed to conduct sufficient studies and develop that

quantity of information necessary for full consideration of the possible effects of the project on noise and air pollution, then it is impossible for there to be a full and effective public participation in the consideration of the project and its alternatives.

Corridor Hearings

The district court held that new corridor hearings are required because section 102(2)(c) of the National Environmental Policy Act of 1969 (NEPA) requires the federal defendants to prepare an environmental impact statement. Such a statement, the court noted, requires reconsideration of the entire Century Freeway project. As the district court said:

> "Not only must they reexamine the specific route and design that they have proposed for the freeway, but they must also consider alternative means of transportation and even abandonment of the project entirely. Section 21100 of CEQA [California Environmental Quality Act of 1970] places similar demands on the state defendants. Since NEPA and CEQA demand a thorough reevaluation, it would make little sense to require the state defendants to seek the views and observations of the public on the design of the freeway, but to excuse them from consulting with the public on the broad issue that PPM 20-8 reserves for corridor hearings—i.e., the issue of 'the need for' the freeway." 352 F.Supp. at 1340.

The majority concludes that new corridor hearings need not be held because neither section 128(a) of the Federal-Aid Highway Act nor NEPA specifically provides that the 1968 amendment to section 128(a) is to be applied retroactively. This conclusion is reached by focusing attention on the fact that corridor hearings were completed prior to the 1968 amendment, rather than on the fact that the entire project was still under consideration, and no final approval of it had been given by that date. In my view, retroactivity, as such, must pertain to the project as a whole and not to the fragments of procedure, such as the corridor hearings.

The majority acknowledges that the determination of the district court is supported by the decisions in *Arlington Coalition on Transportation v. Volpe*, 458 F.2d 1323 (4th Cir. 1972), *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693 (2d Cir. 1972),

and *D.C. Federation of Civic Associations, Inc. v. Volpe,* 434 F.2d 436 (D.C. Cir. 1970).

In *Arlington,* the court felt compelled by the Congressional directive in section 102 of NEPA to conclude that the requirements added by the 1968 amendment to "Section 128(a) apply to a highway ongoing at the effective date of the amendment if the costs of altering or abandoning the proposed location would not certainly outweigh whatever benefits might be derived therefrom." *Id.* at 1337.

In the *Monroe County* case, the Second Circuit reached a similar conclusion but adopted a standard different from *Arlington.* There the initial hearing on the highway project in question had been held several years earlier, in 1966. In holding that new hearings are required whenever federal approval of plans, specifications and estimates for the project ("P S and E approval") has not been given prior to the effective date of the amendment, the Second Circuit said:

> "This rule is based upon the fact that a hearing is a condition precedent to the granting of federal aid, and, therefore, the Secretary must apply the statute which is in effect when he awards that aid. This concept is consistent with the federal policy which favors the advancement of environmental concerns. 42 U.S.C. § 4332(1) [Section 102 of NEPA], and gives recognition to the importance of the hearings to proper decision making [citing *D.C. Federation of Civic Associations, Inc. v. Volpe,* 434 F.2d at 436, 441-442 (D.C. Cir. 1970)]." 474 F.2d at 701.

Although the standard adopted in *Monroe County* does have the virtue of definiteness, I believe that *Arlington* states the better test for determining whether new corridor hearings must be held. The purpose of corridor hearings is to insure an opportunity for public participation in the process of determining the need for, and the location of, a federal highway. PPM 20-8(4)(a)(2). If the costs of altering or abandoning a proposed location would certainly outweigh whatever benefits might be derived therefrom, the new hearings would be a mere formality, and it would be futile to require that they be held simply because P S and E approval was not given prior to the effective date of the amendment.

The *Arlington* test is desirable also because it is similar to the "practicability" test for determining whether a reassessment of the "basic course of action" is required by NEPA. Thus, in practice, it is only where a reassessment of the basic course of action of the proposed project is practicable and therefore required by NEPA, and the original corridor hearings failed to meet the requirements of the 1968 amendment, that the corridor hearing procedures of section 128 should be reinstituted.

The reassessment of the project required by NEPA necessarily entails consideration of the "need for" the project. Section 128(a) and PPM 20-8 decree that state officials may not make decisions on such basic issues as the "need for" a highway without public participation at corridor hearings. It is appropriate, therefore, that those hearing procedures be utilized for the reevaluation that both NEPA and CEQA require. This approach is entirely consistent with the Congressional directive that the laws of the United States be interpreted and administered in accordance with the policies of NEPA "to the fullest extent possible." *See Arlington Coalition on Transportation v. Volpe, supra,* at 1337.

In rejecting the district court's conclusion that new corridor hearings must be held, the majority emphasizes the fact that "[i]n the enactment of NEPA Congress neither mentioned the amended Federal Highway Act nor used any language suggesting its retroactivity." This statement, it seems to me, either ignores the strong policy directive contained in NEPA, or misconceives the reasons for inclusion of that directive. Indeed, the only case the majority cites in support of its position is *Township of Hopewell v. Volpe,* 446 F.2d 167 (3d Cir. 1971), a case in which NEPA was not even mentioned.

It is probable than when Congress enacted NEPA it did not even consider the issue raised on this appeal. Congress recognized that it was impossible for it to examine each existing piece of federal legislation in order to identify a construction which would best serve its environmental protection goals under all circumstances. Thus, instead of undertaking such a task, Congress directed that "to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policy set forth in this chapter. . . ."

42 U.S.C. § 4332. This clear statement of Congressional intent is rendered meaningless by the conclusion that a suggested application of a federal statute in furtherance of the policies of NEPA is to be rejected, as the majority states, because Congressional intent is "buried in a statement of general policy rather than expressly stated."

I am in full agreement with the views expressed by the district court with regard to the necessity for new design and corridor hearings.

While the State urges a defense of laches, the majority did not find it necessary to discuss that issue. Whether the defense of laches bars a cause of action depends upon the circumstances of the case and is a question addressed to the equitable discretion of the trial court. *Burnett v. New York Central R. Co.*, 380 U.S. 424, 435 (1965). Under all of the circumstances of this case, I do not believe there was such lack of diligence and unreasonable delay as would require us to hold that, in rejecting this defense, the district court abused the discretion vested in him.

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APPENDIX "B."

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RALPH W. KEITH and ESTHER MAY KEITH, husband and wife, et al.,

Plaintiffs-Appellees,

vs.

CALIFORNIA HIGHWAY COMMISSION, DEPARTMENT OF PUBLIC WORKS, JAMES A. MOE, individually and in his capacity as Director of CALIFORNIA DEPARTMENT OF PUBLIC WORKS, and ROBERT DATEL, individually and as State Highway Engineer, California Division of Highways, California Department of Public Works,

Defendants-Appellants.

No. 72-3072

RALPH W. KEITH and ESTHER MAY KEITH, husband and wife, et al.,

Plaintiffs-Appellees,

vs.

CLAUDE S. BRINEGAR, as Secretary of Transportation; SHERIDAN A. FARIN, as Administrator for Region 7, Federal Highway Administration, Department of Transportation; DONALD E. TRULL, as Division Engineer, Federal Highway Administration, Department of Transportation,

Defendants-Appellants.

[September 27, 1974]

On Appeal from the United States District Court
for the Central District of California

Before: CHAMBERS, MERRILL, KOELSCH, BROWNING, DUNIWAY, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN, WALLACE and SNEED, Circuit Judges.

OPINION

DUNIWAY, Circuit Judge:

We elected to hear this case in banc, together with *Lathan v. Brinegar,* ..... F.2d ....., also decided today, to consider whether the court erred in enjoining further work on an interstate freeway until a further public hearing is held under section 128(a) of the Federal-Aid Highway Act, (23 U.S.C. §128(a)), as amended.

This case, like *Lathan v. Brinegar, supra,* deals with an interstate highway. Highway I-105, also called the Century Freeway, is a proposed seventeen-mile section of interstate highway which, if constructed, will stretch across the southern portion of the densely populated Los Angeles basin. It would connect the Los Angeles International Airport on the west with the San Gabriel River Freeway (I-605) on the east, and would traverse the cities of El Segundo, Hawthorne, Inglewood, Lynwood, South Gate, Paramount, Downey, and Norwalk, the Watts section of the city of Los Angeles, and unincorporated areas of Los Angeles County, including the communities of Willowbrook and Bel Aire.

In *Lathan v. Brinegar, supra,* we have described the statutes, policy memoranda, and regulations in effect at various times during the planning of the portion of highway I-90 there involved. We do not repeat that description here. The following recital of what has been done about highway I-105 assumes familiarity with that description.

The state defendants divided the Century Freeway into two segments for the purpose of conducting corridor public hearings. Two hearings were held for each segment, the first conducted by the California Division of Highways and the second by the California Highway Commission. The two corridor hearings for the western segment of the freeway were held on June 5, 1963, and August 13, 1965, and the two hearings for the eastern

segment were held on March 30, 1967, and April 16, 1968. Department of Transportation approval of the location of the western portion of the freeway was received on April 22, 1968, and approval of the location of the eastern portion was received on October 14, 1968.

The state defendants then divided the proposed freeway into eight segments for the purposes of planning the highway design, holding design hearings, and securing FHWA approval of their design proposals. One segment received FHWA design approval on August 14, 1968.[1] All of the highway design public hearings for the remaining seven segments were held after August 23, 1968, and were therefore subject to the amended version of section 128(a). In addition, three of the seven hearings were held after January 1, 1970, the effective date of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§4321-4347.[2] Federal design approvals of seven of the eight segments were received after August 23, 1968, and five of the seven were received after September 1, 1970.[3]

No environmental impact statement (EIS) had been prepared for the freeway before February 16, 1972, when this action was filed. The district court ordered the defendants to prepare one, 352 F.Supp. at 1330-36, and the defendants acquiesced. They have not appealed from this part of the district court's order and have informed this court that an EIS is being prepared.

As of April 24, 1972, the state had acquired, at a cost of over $88 million, 55.8% of the right-of-way property for the freeway.[4]

[1]The record does not indicate whether a highway design public hearing was held for that segment.

[2]The seven highway design public hearings were held on June 24, July 8, September 17 and October 15 of 1969 and January 28, April 22 and May 13, 1970. R.A. 426-28, 430-31.

[3]The eight highway design approvals were obtained on the following dates: August 14, 1968; September 10 and December 23, 1969; and February 12, April 14, July 2, December 1 and December 15, 1970. In addition, the design that was approved on September 10, 1969, was subsequently revised; the revisions received approval on December 23, 1970.

[4]If it should ultimately decide that the freeway should not be built, or that some or all of it should be relocated, that would not mean a loss of $88 million. Presumably, the state has received for this money real property having a fair market value of $88 million.

It is estimated that the total cost of the freeway will be $501,800,000. It is also estimated that 9,000 families, including 21,000 individuals, will be displaced, and that 3,900 single family dwellings and 3,000 multiple family dwellings will be acquired in order to clear the right-of-way. Thus the Century Freeway is further along in development than the I-90 freeway segment under consideration in *Lathan v. Brinegar, supra.* It is still true, however, that no PS&E approval has been sought or obtained, by no means all of the land in the corridor has been acquired, and no construction has been undertaken.

The opinion of the district court, which embodies its findings of fact and conclusions of law, is reported in *Keith v. Volpe,* C.D.Cal., 1972, 352 F.Supp. 1324. The pertinent portions of the preliminary injunction entered are as follows:

> "1. Defendants be and hereby are enjoined from any and all activities in furtherance of the Century Freeway, except for such activities as may be necessary for defendants to comply with this Preliminary Injunction and except for such activities that are specifically authorized by this Court pursuant to paragraph 3 of this Preliminary Injunction.
>
> 2. This Preliminary Injunction shall remain in effect until further order of this Court or until:
>
> • • •
>
> (c) state defendants certify to defendant Volpe that they have held, or provided the opportunity for, additional public hearings on the Century Freeway, which hearings shall focus on the effect of the freeway on air and noise pollution, in accordance with Section 128(a) of the Federal-Aid Highway Act, 23 U.S.C. §128(a), and PPM 20-8, 23 C.F.R. Part 1, Appendix A;"[5]

Under our decision in *Lathan v. Brinegar, supra,* it was proper for the court to condition lifting the injunction on a new hearing or hearings under section 128(a). Indeed, under that decision, his order could have been considerably more broad than it is. The appellees, however, have not cross-appealed, and thus

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[5]PPM 20-8 has now been codified as 23 C.F.R. §§790.1-790.11 (1973), with some modifications. Other provisions of the preliminary injunction have not been attacked on this appeal.

the only question before us is whether the portion of the preliminary injunction that we have quoted should be reversed. Clearly, it should not.

We do not read the injunction as excluding other matters from consideration at the new section 128(a) hearing or hearings. For the reasons stated in our decision in *Lathan v. Brinegar, supra,* it should not. We also think that the EIS, now in preparation (perhaps, by now, actually prepared), should be available before and at, and considered at, the hearing or hearings.

Affirmed.

CHAMBERS, Circuit Judge, concurring:

On the basis of my concurring opinion in Lathan v. Brinegar, ... F.2d ....., I concur in the result reached in this case. The information omitted was clearly relevant to the considerations in 23 C.F.R. § 790.3(c)(6). The district court's findings that the considerations were of paramount importance and that almost no information was given on the subjects have not been shown to be clearly erroneous.

WALLACE, Circuit Judge, Dissenting:

I respectfully dissent.

The district court enjoined further highway action until the state holds new hearings complying with 23 U.S.C. § 128(a). In effect, the district court has assumed that the state wants the highway and has, therefore, ordered new hearings.

The state has, as yet, submitted no plans to the secretary. For the reasons stated in my concurring opinion in *Lathan v. Brinegar,* ..... F.2d ....., ... (9th Cir. ..... 1974), I would hold that the judicial tampering with the hearing process was premature and that compliance with section 128(a) cannot be challenged in the courts until the state certifies to the secretary that the requisite hearings have been held.

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APPENDIX "C."

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROOSEVELT LATHAN and PEARLINE LATHAN, et al.,
Plaintiffs,
CITIZENS AGAINST FREEWAYS, et al.,
Intervenor-Plaintiffs-Appellants,
vs.
CLAUDE S. BRINEGAR, Secretary of the United State Department of Transportation, et al.,
Defendants-Appellees.

No. 72-2932

ROOSEVELT LATHAN and PEARLINE LATHAN, et al.,
Plaintiffs-Appellees,
vs.
CLAUDE S. BRINEGAR, Secretary of the United State Department of Transportation, et al.,
Defendants,
WASHINGTON STATE HIGHWAY COMMISSION; WASHINGTON STATE DEPARTMENT OF HIGHWAYS; GEORGE D. ZAHN, as Chairman of the Washington State Highway Commission; G. H. ANDREWS, as Director of the Washington State Department of Highways; E. I. ROBERTS, District Engineer, District No. 7, Washington,
Defendant-Appellants.

No. 72-2974

[September 27, 1974]

On Appeal from the United States District Court
for the Western District of Washington

Before: CHAMBERS, MERRILL, KOELSCH, BROWNING, DUNIWAY, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN, WALLACE and SNEED, Circuit Judges.

OPINION

DUNIWAY, Circuit Judge:

We elected to hear these appeals, and the appeal in *Keith v. California Highway Commission*, No. 72-3072, ... F.2d ....., which we also decide today, in banc, primarily to consider whether a new public hearing, under 28 U.S.C. §128(a), must be held before further actions are taken to carry out the construction of two portions of interstate freeways.

The present case involves a new chapter in the continuing saga of Interstate Highway 90 (I-90) in the state of Washington,[1] specifically that portion which has been proposed to connect two existing interstate highways (I-5 and I-405) near Seattle. Most of the relevant facts are set out in *Lathan v. Volpe*, 9 Cir., 1971, 455 F.2d 1111, 1114. The following events have occurred since that decision:

In an attempt to comply with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§4321-4347, and with our mandate in *Lathan v. Volpe, supra*, the Washington State Department of Highways (WSDH) prepared an environmental impact statement (EIS) for the so-called "Seattle segment" of I-90.[2] The EIS was approved by the Secretary of Transportation

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[1] *See generally Brooks v. Volpe*, 9 Cir., 1972, 460 F.2d 1193; *Latham v. Volpe*, 9 Cir., 1971, 455 F.2d 1111; *Daly v. Volpe*, W.D.Wash., 1972, 350 F.Supp. 252; *Lathan v. Volpe*, W.D.Wash., 1972, 350 F.Supp. 262; *Brooks v. Volpe*, W.D.Wash, 1972, 350 F.Supp. 269.

[2] This illustrates the practice of state highway departments of dividing proposed freeway projects into small segments for purposes of applying for funding. While this practice is certainly rational in view of the way in which Federal-aid highway funds are allocated, it makes coherent environmental planning extremely difficult. *See* Peterson and Kennan, *The Federal-Aid Highway Program: Administrative Procedures and*

on May 5, 1972. Shortly thereafter WSDH sought and obtained Federal Highway Administration (FHWA) approval of the design of the Seattle segment. On August 4, 1972, in response to a motion by intervenors Citizens Against Freeways (Citizens), the district court ruled that the EIS did not satisfy the requirements of NEPA and that the statement required by 49 U.S.C. §1653(f) and 23 U.S.C. §138 regarding the proposed taking of parkland (the 4(f) statement) was inadequate. The court continued in effect its order enjoining the further acquisition of land in the proposed freeway corridor until proper impact and 4(f) statements were prepared and circulated. However, the court refused to order new public hearings for the project pursuant to 23 U.S.C. §128(a) and struck Citizens' belatedly raised claim that the Secretary of Transportation, rather than WSDH, must prepare the impact statement. These appeals followed.

I. *The Section 128(a) Hearing.*

Citizens argues that a new public hearing must be held pursuant to 23 U.S.C. §128(a).

Consideration of this issue requires an exposition of the history of relevant statutes, regulations, and policy memoranda that have been in effect during the time when the I-90 freeway segment was being planned, and what has been done to comply with them up to now.

Under the Federal-Aid Highway Act,[3] 23 U.S.C. §101 *et seq.*,[4] primary responsibility for highway planning, design and con-

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Judicial Interpretation, 2 Env. L. Rep. 50001 (1972). For the sake of clarity, this opinion will refer to the entire five-mile segment of I-90 involved in this case as the "freeway segment," and the portion for which an environmental impact statement has been prepared will be referred to as the "Seattle segment."

[3]For a thorough statutory history of the Federal-Aid Highway Act, *see* Mashaw, *The Legal Structure of Frustration: Alternative Strategies for Public Choice Concerning Federally Aided Highway Construction*, 122 U. Pa. L. Rev. 1, 5-12 (1973).

[4]Under 23 U.S.C. §103, the Federal-Aid Highway Program consists of three systems: (1) the Interstate System (§103(d)), which is to "connect . . . the principal metropolitan areas" and "serve the national defense. . . ." (2) the Federal-aid primary system (§103(b)), which "shall consist of an adequate system of connected main highways"; and

struction rests on state highway departments, aided by federal assistance.[5] The FHWA, which administers the Federal-Aid Highway Program, ascertains that the state highway departments have adhered to federal law and regulations before authorizing reimbursement to the states for a portion of the federal-aid highways' cost. This adherence to federal standards is assured by requiring the state highway departments to obtain federal approval at various stages during the conception and building of a highway project.

The matrix of rules governing the stages of FHWA approval is found not only in the Federal-Aid Highway Act, 23 U.S.C. §101 *et seq.*, but also in the Code of Federal Regulations and numerous FHWA directives, including Policy and Procedure Memoranda (PPM's), Instructional Memoranda (IM's) and Administrative Memoranda (AM's).[6]

The key concept in the Federal-Aid Highway Program is the "project." For example, state highway departments must submit

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(3) the Federal-aid secondary system (§103(c)), which may include "farm-to-market roads, rural mail routes, public school bus routes, local rural roads, county roads, township roads, and roads of the county road class . . . ." I-90 is part of the Interstate System.

[5]Pursuant to 23 U.S.C. §120(c), the federal government pays 90% of the total cost of projects which form part of the Interstate System. Federal appropriations have been funded since 1956 by highway user taxes deposited into the Highway Trust Fund, which was created under the Federal-Aid Highway Act of 1956, Act of June 29, 1956, ch. 462, Tit. II, §209, 70 Stat. 397.

[6]We must and do give considerable deference to the regulations promulgated by the Secretary of Transportation and published in the Code of Federal Regulations. 23 U.S.C. §315 authorized the Secretary of Commerce to "prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this title." This authorization was transferred to the Secretary of Transportation in 1966 pursuant to 49 U.S.C. §1655(a). *See generally* K. Davis, *Administrative Law Treatise*, §5.04 (1970 Supp.)

The legal effect of the PPM's, IM's and AM's however, is much less clear. The Department of Transportation has ruled that the FHWA's memoranda and orders do not rise to the status of regulations: "The [Federal Highway] Administrator shall promulgate and require the observance of policies and procedures, and may take other action as he deems appropriate or necessary for carrying out the provisions and purposes of Federal laws, the policies of the Federal Highway Adminis-

"programs of proposed projects" for approval under 23 U.S.C. §105(a), and section 106(a) requires approval of plans, specifications and estimates for "each proposed project" included in a program approved under section 105(a). Unfortunately, a "project" assumes chameleon-like characteristics under the Act.[7] For example, a state highway department could seek to obtain FHWA approval of a "project" which includes all the items of work necessary to construct Interstate X, a fifty-mile highway. On the other hand, it could also submit to the FHWA several "projects," each of which forms a part of highway X. Thus, the department might simply submit a grading and paving "project" for twenty miles of I-X, or a right-of-way acquisition "project" for five miles of I-X, or simply a demolition "project" for one mile of the highway.[8] The statutory and regulatory definitions of "project" are broad enough to embrace a one-mile demolition "project" or a fifty-mile planning, surveying, mapping, right-of-way acquisition, relocation assistance, demolition, grading and paving "project."[9]

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tration, and the regulations in this part. No such direction, policy, rule, procedure, or interpretation contained in a Federal Highway Administration order or memorandum shall be considered a regulation or create any right or privilege not specifically stated therein." 23 C.F.R. §1.32(a) (1973). *But see* Gray, *Environmental Requirements of Highway and Historic Preservation Legislation,* 20 Catholic U. L. Rev. 45, 61-2, n. 66 (1970).

[7] *Cf. Named Individual Members of the San Antonio Conservation Society v. Texas Highway Dep't,* 5 Cir. 1971, 446 F.2d 1013, 1022-24.

[8] *See* Peterson and Kennan, *supra,* n. 2 at 50003.

[9] Section 101(a) of the Act defines the term "project" to mean "an undertaking to construct a particular portion of a highway, or if the context so implies, the particular portion of a highway so constructed." That section defines the term "construction" to mean

> "the supervising, inspecting, actual building, and all expenses incidental to the construction or reconstruction of a highway, including locating, surveying, and mapping . . . , acquisition of rights-of-way, relocation assistance, elimination of hazards of railway grade crossings, acquisition of replacement housing sites, acquisition and rehabilitation, relocation, and construction of replacement housing, and improvements which directly facilitate and control traffic flow, such as grade separation of intersections, widening of lanes, channeliza-

With this caveat, we proceed to examine the statutory, regulatory and administrative scheme controlling this litigation.[10]

1. *Program approval.*

The first decision that must be made by the FHWA is whether to approve a state's federal-aid highway program. Under 23 U.S.C. §105(a), a state highway department "of any State desiring to avail itself of the benefits of this chapter shall submit to the Secretary for his approval a program or programs of proposed projects for the utilization of the funds appointed." Every project in a proposed program must be "located upon an approved Federal-aid system," or it will not receive approval. The Secretary may approve a program in whole or simply approve individual projects within a program. *Id.*

2. *Public hearings.*

a. *Those that have been held.*

(1) *The 1963 hearing.*

23 U.S.C. §128(a) provides that any state highway department which submits plans for a federal-aid highway project involving the "going through" of a city must certify to the Secretary that it has held public hearings and has considered the effect of such locations. As originally enacted,[11] section 128(a) required only that the *economic* effects of such a highway be considered at the hearing.

This was the statute in effect when, in 1963, WSDH held a corridor or location hearing on the freeway segment. (See *Lathan v. Volpe, supra,* 455 F.2d at 1114.) At that time there was no

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tion of traffic, traffic control systems, and passenger loading and unloading areas." 23 U.S.C. §101(a).

23 C.F.R. §1.2(b) (1973) defines a "project" as "[a]n undertaking by a State highway department for highway construction, including preliminary engineering, acquisition of rights-of-way and actual construction, or for highway planning and research, or for any other work or activity to carry out the provisions of the Federal laws for the administration of Federal aid for highways."

[10] *See also Lathan v. Volpe, supra,* 455 F.2d at 1114-16. *But see* Peterson and Kennan, *supra,* n. 2, at 50017-18.

[11] Act of Aug. 27, 1958, Pub. L. No. 85-767, 72 Stat. 902.

Regulation dealing with such a hearing; it was governed by a PPM. In *Lathan v. Volpe, supra,* we rejected an attack, based upon due process grounds, upon the validity of this 1963 hearing. 455 F.2d at 1122. We assume, for the purpose of this decision, that the hearing complied with §128(a) as it then read, and with the then applicable PPM. Thereafter, the FHWA approved the proposed location or corridor.

(2) *The 1970 hearing.*

Section 128(a) was amended effective August 23, 1968,[12] to require that the hearings also consider the social and environmental impact of the proposed highway. The amended version reads as follows (the requirements added in 1968 are italicized):

> "Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic *and social* effect of such a location, *its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community.*"

On January 1, 1970, the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4347, became effective. We discuss its impact on the hearing issue later in this opinion.

On June 2-6, 1970, WSDH held a design public hearing on the Seattle segment.[13] This hearing was governed by PPM 20-8, effective January 14, 1969. It defines and describes a "highway design public hearing" as set out in the margin.[14] Federal ap-

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[12]Act of Aug. 23, 1968, Pub. L. No. 90-495, §24, 82 Stat. 828.

[13]See n. 2, *supra.*

[14]PPM 20-8, *quoted in* 3 Env. L. Rep. 46505:

4. *DEFINITIONS*
(As used in this PPM)

• • •

"b. A 'highway design public hearing' is a public hearing that:
(1) Is held after the route location has been approved, but before the State highway department is committed to a specific design proposal;

proval of the design was received on June 23, 1972. Again, we assume that the hearing complied with these requirements.

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(2) Is held to ensure that an opportunity is afforded for effective participation by interested persons in the process of determining the specific location and major design features of a Federal-aid highway; and

(3) Provides a public forum that affords a full opportunity for presenting views on major highway design features, including the social, economic, environmental, and other effects of alternate designs.

c. 'Social, economic, and environmental effects' means the direct and indirect benefits or losses to the community and to highway users. It includes such effects that are relevant and applicable to the particular location or design under consideration such as:

(1) Fast, safe and efficient transportation.
(2) National defense.
(3) Economic activity.
(4) Employment.
(5) Recreation and parks.
(6) Fire protection.
(7) Aesthetics.
(8) Public utilities.
(9) Public health safety.
(10) Residential and neighborhood character and location.
(11) Religious institutions and practices.
(12) Conduct and financing of Government (including effect on local tax base and social service costs).
(13) Conservation (including erosion, sedimentation, wildlife and general ecology of the area).
(14) Natural and historic landmarks.
(15) Noise, and air and water pollution.
(16) Property values.
(17) Multiple use of space.
(18) Replacement housing.
(19) Education (including disruption of school district operations).
(20) Displacement of families and businesses.
(21) Engineering, right-of-way and construction costs of the project and related facilities.
(22) Maintenance and operating costs of the project and related facilities.
(23) Operation and use of existing highway facilities and other transportation facilities during construction and after completion.

This list of effects is not meant to be exclusive, nor does it mean that each effect considered must be given equal weight in making a determination upon a particular highway location or design.

* * *

b. *The question whether there must be another hearing.*

In December, 1970, section 128(a) was further amended[15] to require the state to file a report with the Secretary indicating the consideration given to the economic, social, environmental and other effects of a proposed highway.

The Secretary has now adopted regulations governing "corridor" and "design" hearings. Part 790 of 23 Code of Federal Regulations (1973) expands upon the requirements of section 128(a). The purpose of these regulations

> "is to insure, to the maximum extent practicable, that highway locations and designs reflect and are consistent with Federal, State, and local goals and objectives. The rules, policies, and procedures established by this part are intended to afford full opportunity for effective public participation in the consideration of highway location and design proposals by highway departments before submission to the Federal Highway Administration (FHWA) for approval. They provide a medium for free and open discussion and are designed to encourage early and amicable resolution of controversial issues that may arise." 23 C.F.R. §790.1(a)(1973).

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9. *CONSIDERATION OF SOCIAL, ECONOMIC, AND ENVIRONMENTAL EFFECTS*

State highway departments shall consider social, economic, and environmental effects before submission of requests for location or design approval, whether or not a public hearing has been held. Consideration of social economic, and environmental effects shall include an analysis of information submitted to the State highway department in connection with public hearings or in response to the notice of the location or design for which a State highway department intends to request approval. It shall also include consideration of information developed by the State highway department or gained from other contacts with interested persons or groups.

* * *

10. *LOCATION AND DESIGN APPROVAL*

* * *

(b) Design study reports must describe essential elements such as design standards, number of traffic lanes, access control features, general horizontal and vertical alignment, right-of-way requirements and location of bridges, interchanges, and other structures."

[15]Act of Dec. 31, 1970, Pub. L. No. 91-605, Tit. I, §135, 84 Stat. 1734.

The regulations require a state highway department to obtain two FHWA approvals in order to receive federal reimbursement: "route location approval," which follows a "corridor public hearing,"[16] and "design approval,"[17] which follows a "design public hearing."[18]

The regulations thus require that the state highway departments must hold two public hearings, or provide an opportunity for those hearings.[19] First, there must be a "corridor public hearing," which is held "to ensure that an opportunity is afforded for effective participation by interested persons in the process of determining the need for, and the location of, a Federal-aid highway." 23 C.F.R. §790.3(a)(2)(1973). It must provide "a public forum that affords a full opportunity for presenting views on each of the proposed alternative highway locations and the social, economic, and environmental effects of those alternate locations." 23 C.F.R. §790(a)(3)(1973).

Second, the state highway department must hold a "highway design public hearing," which is held "to ensure that an opportunity is afforded for effective participation by interested persons in the process of determining the specific location and major design features of a Federal-aid highway," and to provide "a public forum that affords a full opportunity for presenting views on major highway design features, including the social, economic, environmental, and other effects of alternate designs." 23 C.F.R. §790.3(b)(2)-(3).[20]

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[16]*See* 23 C.F.R. §790.9(e)(1)(ii) (1973).

[17]*See* 23 C.F.R. §790.3(d) (1973).

[18]*See* 23 C.F.R. §790.9(e)(2)(iii) (1973).

[19]*See* 23 C.F.R. §§790.1(b), 790.5(a) (1973).

[20]The "social, economic, and environmental effects" which must be considered in both a corridor hearing and a design hearing (*see* 23 C.F.R. §§790.3(a)(3) and (b)(3) (1973)) are now defined in 23 C.F.R. §790.3(e) (1973):

> "(e) 'Social, economic, and environmental effects' means the direct and indirect benefits or losses to the community and to highway users. It includes such effects that are relevant and applicable to the particular location or design under consideration as to:
>
> (1) Regional and community growth including general plans and proposed land use, total transportation requirements, and status of the planning process.

Neither location approval nor design approval by the FHWA creates a contractual obligation on the part of the federal government to reimburse a state for costs incurred in the project. There is one more stage to be completed before the federal government is finally committed to the project. This is called plans, specifications and estimates approval (PS&E approval).

After a state highway department has certified to the Secretary that it has held appropriate section 128(a) hearings, or has afforded the opportunity for such hearings, the state department must

> "submit to the Secretary for his approval, as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed *project* included in an approved program as the Secretary may require. . . . [The Secretary's] approval of any such *project* shall be deemed a contractual obligation of the Federal Government. . . ." 23 U.S.C. §106(a) (emphasis supplied).

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(2) Conservation and preservation including soil erosion and sedimentation, the general ecology of the area as well as manmade and other natural resources, such as: park and recreational facilities, wildlife and waterfowl areas, historic and natural landmarks.

(3) Public facilities and services including religious, health, and educational facilities; and public utilities, fire protection and other emergency services.

(4) Community cohesion including residential and neighborhood character and stability, highway impacts on minority and other specific groups and interests, and effects on local tax base and property values.

(5) Displacement of people, businesses ,and farms including relocation assistance, availability of adequate replacement housing, economic activity (employment gains and losses, etc.).

(6) Air, noise, and water pollution including consistency with approved air quality implementation plans, FHWA noise level standards, and any relevant Federal or State water quality standards (as set forth in Parts 770, 771, 772, and 773 of this chapter).

(7) Aesthetic and other values including visual quality, such as: 'view of the road' and 'view from the road,' and the joint development and multiple use of space.

This listing is not meant to be exclusive, nor does it mean that each effect considered must be given equal weight in making a determination upon a particular highway location or design."

The federal government is not obligated to fund a project until the Secretary has given approval to a project. *Monroe County Conservation Council, Inc. v. Volpe,* 2 Cir., 1972, 472 F.2d 693, 699. After PS&E approval has been given to a "project," a state is entitled to full reimbursement of the federal government's share of the project's cost if the department has conformed to all applicable federal laws.[21] It is important to emphasize that PS&E approval is given to an individual "project," which, as noted *infra,* p. 13, may consist of all the work on an entire highway or merely the right-of-way acquisition for an interchange.

The question now before us is whether the WSDH must now hold, before applying for PS&E approval, another hearing complying with section 128(a) as it now reads, and as it may be affected by NEPA.

The parties have framed the question in terms of "retroactivity"—i.e., are amended section 128(a) and NEPA "retroactive" so that a new "corridor" or "location" hearing must be held, or a new "design" hearing must be held, thus in effect "nullifying" the two hearings that have been held. This position misses the mark. I-90 is an ongoing project, to which the federal government is not yet committed because there has been as yet no PS&E approval. The district court sits in this case as a court of equity, as do we, and it is well settled that a court of equity may, and often does, apply the law in effect at the time of judgment, rather than that in effect when the action is filed. *Chapman v. Sheridan-Wyoming Co.,* 1950, 338 U.S. 621, 630.

Moreover, we have no doubt that the Congress can require that there now be a hearing complying with amended section 128(a) and with the policies of NEPA, and we are of the opinion that it has done so.

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[21]Under 23 U.S.C. §110(a), the Secretary cannot enter into a "formal project agreement" with a state highway department until he has given PS&E approval, and under 23 U.S.C. §121(c), no federal payments may be made unless the project is located on a Federal-aid highway system and is covered by a project agreement. Moreover, under 23 U.S.C. §121(b), a state is entitled to final payment from the federal government only if the project has been completed "in accordance with the plans and specifications. . . ."

First, section 128(a) speaks in the present tense:

> "Any State highway department which *submits* plans . . . shall certify to the Secretary that it has had public hearings . . . and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community." (Emphasis supplied)

This is the law currently in effect. Moreover, to obtain PS&E approval, WSDH must submit plans, specifications and estimates to FHWA. When it does so, it must have held a hearing or hearings at which consideration has been given to the matters now listed in section 128(a), or it must have afforded the opportunity for such hearings.

This view of the statute's present effect upon the inchoate I-90 project is strengthened by the adoption of NEPA. In that statute, the Congress, recognizing "the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man," declares that it is the policy of the federal government "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of America." 42 U.S.C. §4331(a). To realize this goal, Congress has directed that, *"to the fullest extent possible* . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies" of NEPA. 42 U.S.C. §4332(1). (Emphasis added)

The meaning of the phrase "to the fullest extent possible" was clearly expressed by the Senate and House conferees who wrote the language:

> "[I]t is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section [4332]. Rather, the language in section [4332] is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section 'to the fullest extent possible' under their statutory authorizations and that no agency shall utilize an

excessively narrow construction of its existing statutory authorizations to avoid compliance."[22]

The language "to the fullest extent possible" indicates an intent to apply NEPA's standards to ongoing projects such as I-90. It has been so construed by the Council on Environmental Quality, a NEPA-created entity. Its language concerning the applicability of NEPA's requirement of environmental impact statements to ongoing projects demonstrates the approach which should also be taken to the question of section 128(a) hearings. To paraphrase:

> "To *the maximum extent practicable* the Section [128(a)] procedure should be applied to further major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to the enactment of [NEPA] on January 1, 1970. Where it is not practicable to reassess the basic course of action, it is still important that further incremental major actions be shaped so as to minimize adverse environmental consequences. *It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program.*" Council on Environmental Quality, Statements on Proposed Federal Actions Affecting the Environment—Guidelines, ¶11, 36 Fed. Reg. 7724, 7727 (April 23, 1971). (Emphasis added)

It is clear that "further major Federal actions having a significant effect on the environment" will occur here. As noted earlier, formal federal commitment to this project has not yet occurred, because no PS&E approval has been given. The Federal-Aid Highway Act envisions numerous areas of further federal participation beyond corridor and design approval: aiding states in the acquisition of rights-of-way,[23] regulation of the letting of contracts,[24] final inspection and approval before construction,[25] and

[22] 115 Cong. Rec. 40417, 40418 ("Major Changes in S. 1075 as Passed by the Senate"); 115 Cong. Rec. 39701, 39703 (House Conference Report on S. 1075).

[23] *See* 23 U.S.C. §107.

[24] *See* 23 U.S.C. §112.

[25] *See* 23 U.S.C. §114(a).

reimbursement to the states of construction costs,[26] to name but a few.[26a]

Although WSDH and the federal government have had various formal and informal contracts since 1963 concerning the freeway segment, the Secretary of Transportation has not given PS&E approval to this "project," and the federal government is therefore not contractually obligated to provide highway aid, 23 U.S.C. §106(a). If and when the Secretary does give PS&E approval to the freeway segment, however, he must apply the law which is in effect when he commits federal funds to the project. This means that there must have been a hearing held or opportunity for a hearing in compliance with section 128(a) as it now reads, at which the matters considered include those now specified in section 128(a) and those now specified in NEPA, particularly 42 U.S.C. §4332(2)(C) and (2)(D).[27]

We cannot ignore, as judges, what we know as citizens. The knowledge and attitudes of the public, of the Congress, and of state and local governments about the environmental and social consequences of freeway building have drastically changed within the last decade. With knowledge has come concern, and that con-

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[26] *See* 23 U.S.C. §121.

[26a] By listing these examples we do not at all imply that there must be an additional section 128(a) hearing before each step is taken. See page 13, *infra*.

[27] "(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

• • •

(D) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources"

cern is reflected in the 1968 and 1970 amendments to section 128(a) and in NEPA. The proposed segment of I-90 is to be built in the future, an decisions about it are to be governed by the law at it reads now, not as it read in 1963.

In short, we hold under the facts here that the policies of NEPA and section 128(a) must be construed together and that section 128(a) provides a public forum at which, among other things, the NEPA required EIS will be a basis for the hearing.

In so holding, we have the support of our own prior decisions, and of those of other circuits. We have held that agencies are not relieved of the obligation to evaluate the environmental consequences of their actions merely because a particular project was initiated before the effective date of NEPA. *See Jicarilla Apache Tribe of Indians v. Morton,* 9 Cir., 1973, 471 F.2d 1275, 1282-83; *Lathan v. Volpe, supra,* 455 F.2d at 1120-21. With respect to ongoing projects, section 128(a) and the regulations which implement it must be interpreted and administered, "to the fullest extent possible," in accordance with the policies of NEPA. In appropriate cases this may mean total reassessment of the project in light of its potential evironmental impact, i.e., the consideration of its wholesale alteration or abandonment. *Cf. Jicarilla Apache Tribe of Indians v. Morton, supra.*

Although NEPA itself does not provide for public hearings, its general directives contain one clear message: Environmental protection is a part of every federal agency's mandate; the Act requires "agencies to *consider* environmental issues just as they consider other matters within their mandates." *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n,* D.C.Cir., 1971, 449 F.2d 1109, 1112. (Emphasis in original) Section 128(a) provides the forum for doing so. In cases in which the Secretary has not given PS&E approval to a project, other Circuits have ordered new section 128(a) hearings. *Monroe County Conservation Council v. Volpe,* 2 Cir., 1972, 472 F.2d 693, 701-02; *Arlington Coalition on Transp. v. Volpe,* 4 Cir., 1972, 458 F.2d 1323, 1337-38.[28]

[28]While the court in *Arlington Coalition* states at one point that "P. S. & E. approval has not yet been given," 458 F.2d at 1332, the court at another point states that "by July 28, 1966, acquisition-of-right-of-way agreements between the state highway department and the Secre-

We think that section 128(a) embodies its own test as to when a hearing must have been held—before WSDH "submits plans" —i.e., in this case before WSDH seeks PS&E approval. We therefore do not discuss the relative merits of the "tests" adopted in *Arlington Coalition, supra,* and in *Monroe County, supra.* We do not mean that there must have been a new hearing every time that WSDH submits some change in plans to the Secretary. We are fully aware of the complexity of such a major porject as the I-90 segment, and of the fact that, in such a project changes in plans may be necessary as planning or actual work proceeds. We refer only to major submission, and these are set out in the Federal-Aid Highway Act and the Secretary's regulations as we have outlined them in this opinion.

Nor are repeated section 128(a) hearings required in any case in which a hearing, fully complying with section 128(a) and the policies of NEPA, has once been held, at least absent some really drastic changes in plans occurring thereafter.

We stress that the hearing under section 128(a) must take into account the factors that are now outlined in that section and in NEPA. It will not be merely a new "corridor" or "location"

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tary had been entered into for the entire project," and the state had been reimbursed $28,679,123.07. *Id,* at 1328. The court therefore may have meant to say at p. 1332 that no PS&E approval *for construction* had yet been given.

In *Monroe County,* the state highway department had not yet submitted its plans, specifications and estimates, but it was undisputed that the federal government was prepared to give PS&E approval after submission; *see* 472 F.2d at 696.

Where the highway in question has actually been under construction, it has been held that the amendments do not apply. *Wildlife Preserves, Inc. v. Volpe,* 3 Cir., 1971, 443 F.2d 1273. That is not this case. *See also Ragland v. Mueller,* 5 Cir., 1972, 460 F.2d 1196, and *Pennsylvania Environmental Council, Inc. v. Bartlett,* 3 Cir., 1971, 454 F.2d 613, in which the courts held that NEPA did not apply to Federal-Aid Highway projects in cases in which PS&E approval had been given by the Secretary prior to January 1, 1970, and construction on the highways in question had begun as of the time the lawsuit was commenced. In *Ragland,* for example, sixteen of the twenty miles of the disputed highway had been fully completed as of January 1, 1970, the effective date of NEPA. *See also Citizens Environmental Council v. Volpe,* 10 Cir., 1973, 484 F.2d 870.

hearing or "design" hearing, although of course what was considered at those hearings can be considered. The major focus must be on the total impact of the project as a whole, including whether it should be built at all, as well as whether, if it is to be built, it should be built where and as previously planned.

c. *The claimed sufficiency of the June, 1970, hearing.*

To all of the foregoing the state defendants respond that the design hearing that was held in June of 1970 did comply with section 128(a) as amended, that the matters that we have outlined were considered at that hearing, and that in addition WSDH has had a large number of meetings with interested persons and groups at which the same matters were considered. In short, they claim that there has been substantial compliance with section 128(a), and that no further hearing should be required. On the record before us, we cannot tell whether this claim is sustainable. We do note at least one weakness in it. At the time of the hearing, no EIS had been prepared, and it was the position of WSDH that none was required. See *Lathan v. Volpe, supra*, 455 F.2d at 1120-21. Thus it is not as likely that full consideration was given to the environmental impact of I-90 as would have been given had there been an EIS available for discussion at the hearing. Nevertheless, because the point is strongly pressed, the district court on remand may, if it wishes, consider this claim.

The district court may feel, however, that the case can and should be disposed of more expeditiously by requiring a new hearing or opportunity for a hearing, of the type that we have outlined. The district court might feel that a decision that the June, 1970, hearing was sufficient would simply invite another appeal and further delay. This question we leave to the district court.

WSDH has advised us that the state and FHWA have now prepared a new EIS for the Seattle segment "in strict compliance with" the district court's order, entered following our remand. A copy has been lodged with this court. We decline to consider whether it complies with the district court's order. That is for the district court. However, assuming that the proper administrative approval has been received, this new EIS should form one of the bases of the new section 128(a) hearing, if such

hearing is ordered. The importance of the EIS in the decision-making process cannot be underestimated; the EIS

> "seeks to ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and the cost-benefit balance. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made." *Calvert Cliffs' Coordinating Comm. Inc. v. United States Atomic Energy Comm'n, supra,* 449 F.2d at 1114.

The new EIS should also be made available to the public before the section 128(a) hearings. *See* FHWA PPM 90-1 at ¶6c (August 24, 1971), *quoted in* 3 Env. L. Rep. 46106, 46108. Of course, the hearing itself should not necessarily be limited to the contents of the new EIS. The hearing is "meant to be a 'town hall' type meeting in which people are free to express their views. The hearing was not intended to be a quasi-judicial or adversary legal type hearing." H. Rep. No. 911554, 91st Cong., 2d Sess. (1970), *quoted in* 1970 U.S. Code Cong. & Admin. News, 5392, 5396.

Defendants urge expedition in the disposition of this case. They represent that the costs of construction are rising at the rate of more than $30,000,000 per year. Furthermore, they have pointed to 23 U.S.C. 103(g), which provides, in part:

> "Any segment of the Interstate System, with respect to which a State has not submitted by July 1, 1975, a schedule for the expenditure of funds for completion of construction of each segment or alternative segment within the period of availability of funds authorized to be apportioned for completion of the Interstate System, and with respect to which the State has not provided the Secretary with assurances satisfactory to him that such schedule will be met, shall be removed from designation as a part of the Interstate System."

We agree that the district court should proceed with expedition. *Cf. Lathan v. Volpe, supra,* 455 F.2d at 1120-21.

d. *Res judicata and laches.*

The defendants argue that our mandate in *Lathan v. Volpe, supra,* is *res judicata* on the section 128(a) question, because we there rejected Citizens' due process challenge to the 1963 corridor hearing.[29] This is not correct. The case has not proceeded to final judgment, and the applicable doctrine is therefore law of the case, not *res judicata. See* 1B J. Moore, Federal Practice ¶0.404[1] (2d ed. 1974). Although the object of both rules of law is finality in litigation, the former doctrine applies only to foreclose the reconsideration of matters actually decided. *See Electrical Research Prod. v. Gross,* 9 Cir., 1941, 120 F.2d 301, 307.[30] All that we decided in *Lathan v. Volpe, supra,* was that the plaintiffs' attack on the 1963 hearing, on procedural due process grounds, was barred by laches. Because we did not consider the effects of the section 128(a) amendments on the previous appeal, that issue is properly before us now. *Id.*

Nor can we say that the doctrine of laches precludes plaintiffs from raising the section 128(a) issue. "Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States,* 1961, 365 U.S. 265, 282. It cannot be said here that plaintiffs have slept on their rights since 1963; the earliest date that this claim arose was August 23, 1968, the effective date of the initial amendments to section 128(a). Moreover, NEPA, which has a substantial influence upon our interpreta-

[29]We there stated:

> "Plaintiffs third contention is that the 1963 public hearings on the proposed location of I-90 deprived them of certain procedural rights guaranteed by due process of law. We need not decide the merits of this contention, since we think the equitable defense of laches is available to defendants. Plaintiffs failed to raise this claim for over seven years after the hearing took place, during which time they knew of the hearing and its alleged deficiencies. Defendants have expanded a substantial sum of money in reliance on the validity of that proceeding. Thus the two essential elements of laches—lack of diligence by plaintiff and injurious reliance thereon by defendant—are present and plaintiffs are precluded from challenging the validity of the hearing at this late date." 455 F.2d at 1122.

[30]*See also DePinto v. Landoe,* 9 Cir., 1969, 411 F.2d 297 (court of appeals had expressly reserved the issue).

tion of the effects of the amendments, *see supra,* was not operative until January 1, 1970, less than six months before this action was filed. Thus, Citizens has not been guilty of an extreme lack of diligence in raising this issue. Moreover, WSDH has not sufficiently demonstrated the extent of its reliance upon whatever delay there may have been. Under these circumstances, the doctrine of laches should not be applied to bar the litigation of this important public issue. *Cf. Arlington Coalition on Transp. v. Volpe, supra,* 458 F.2d at 1329-30; *Ward v. Ackroyd,* D.Md., 1972, 344 F.Supp. 1202, 1212-13. We do not here attempt to set out a rule for future highway litigation, since the question of whether laches bars an action in a particular case depends upon the facts and circumstances of that case and is a question addressed primarily to the discretion of the trial court. *Burnett v. New York Central R.R. Co.,* 1965, 380 U.S. 424, 435; *Gardner v. Panama R.R. Co.,* 1951, 342 U.S. 29, 30.

Finally, as we have previously stated, the issue here is not the validity of the 1963 hearing. We do not doubt its validity. The issue is whether present law should now be applied to this partially inchoate major federal project.

II. *The Environmental Impact Statement and Section 4(f) Issues.*

As we have seen, WSDH now maintains that a proper EIS and 4(f) statement regarding the Seattle segment has been prepared. It has thus virtually abandoned its cross-appeal. Nevertheless, we consider the question because there may be further attack on the EIS on remand.[31]

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[31] Citizens argues also that the district court erred in permitting WSDH to attach summaries and comments to the environmental impact statement, rather than the comments in their entirety. Although the federal defendants argue that the district court's order is essentially correct, WSDH has stated that it intends to attach all comments received. This concession disposes of the issue in light of our conclusion that Citizens cannot challenge the district court's order permitting WSDH to prepare the impact statement.

The Administrative Procedure Act, 5 U.S.C. §706, prescribes the scope of review. So far as pertinent here, it provides:

". . . The reviewing court shall—

• • •

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

• • •

(D) without observance of procedure required by law."

Subsection (2)(A) refers primarily to substantive decisions committed to the Agency in the first instance. It may be applicable (we do not say that it is) where it is claimed that the Agency, in deciding whether to proceed with a project, has ignored conclusions or considerations stated in an EIS. Such a question is for the Agency, not the courts, to decide. The scope of judicial review in such a case is narrow, if review be available at all. *See* 5 U.S.C. §701(a)(2); *Citizens to Preserve Overton Park v. Volpe*, 1971, 401 U.S. 402, 410; *Environmental Defense Fund, Inc. v. Armstrong*, 9 Cir., 1973, 487 F.2d 814, 822, n. 13. We could reverse the agency, if at all, only in a rare case, and only if we found its action arbitrary, capricious, an abuse of discretion, or contrary to law. We could not substitute our judgment for that of the Agency. *See Jicarilla Apache Tribe of Indians v. Morton*, 9 Cir., 1973, 471 F.2d 1275, 1279-80, 1281; *Citizens to Preserve Overton Park, supra*, 401 U.S. at 416.

On the other hand, subsection (2)(D) provides that we may set aside agency action if we find it to be without observance of procedure required by law. We regard the question whether an EIS complies with the requirements of NEPA as a procedural question, governed by §706(2)(D). *See Jicarilla Apache Tribe, supra*, 471 F.2d at 1280-81. In *Life of the Land v. Brinegar*, 9 Cir., 1973, 485 F.2d 460, 469, we quoted *Jicarilla Apache Tribe, supra*, regarding substantive decisions, but then apparently applied §706(2)(A) to the question whether the EIS satisfied the requirements of NEPA. This appears to be a misreading of *Jicarilla Apache Tribe*, but our reading of *Life of the Land* convinces us

that the result would be no different if we had thought that §706(2)(D) applied. We later said as much in *Environmental Defense Fund, supra,* 487 F.2d at 815, n. 7.

We stand on §706(2)(D) because NEPA is essentially a procedural statute. Its purpose is to assure that, by following the procedures that it prescribes, agencies will be fully aware of the impact of ther decisions when they make them. The procedures required by NEPA, 42 U.S.C. §4332(2)(C), are designed to secure the accomplishment of the vital purpose of NEPA. That result can be achieved only if the prescribed procedures are faithfully followed; grudging, *pro forma* compliance will not do. We think that the courts will better perform their necessarily limited role in enforcing NEPA if they apply §706(2)(D) in reviewing environmental impact statements for compliance with NEPA than if they confine themselves within the straight jacket of §706(2)(A). *See Wyoming Outdoor Coordinating Council v. Butz,* 10 Cir., 1973, 484 F.2d 1244.

As Mr. Justice Frankfurter said in a criminal case, in words that are equally applicable to the actions of administrative agencies: "The history of liberty has largely been the history of observance of procedural safeguards." *McNab v. United States,* 1943, 318 U.S. 332, 347. So it may also be with the history of environment. *See also Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n,* D.C.Cir., 1971, 449 F.2d 1109, 1114-15; *Silva v. Lynn,* 1 Cir., 1973, 482 F.2d 1282.

This does not mean that the courts are to "fly speck" environmental impact statements. The preparation of such a statement necessarily calls for judgment, and that judgment is the agency's. But the courts can, and should, require full, fair, bona fide compliance with NEPA. That is what the district judge did in this case.

It was not an abuse of discretion for the district court to strike Citizens' request that the Secretary of Transportation be ordered to prepare the EIS. The issue was raised for the first time in a brief which was not served on the defendants until the day of the hearing, and was inconsistent with Citizens' earlier motion to compel WSDH to prepare an adequate impact statement.

The district court did not err in permitting the inadequate EIS to be re-circulated as a draft. Circulation of a grossly inadequate statement as the draft of a new one could conceivably frustrate the goal of obtaining informed agency and public comment on the environmental consequences of a proposed project, and in some circumstances this could amount to a violation of the responsible agency's duty to "develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations." 42 U.S.C. §4332(2)(B). However, Citizens has not demonstrated that this is such a case.

We think that the motion of plaintiffs-appellants and intervenors for attorney's fees should be considered in the first instance by the district court.

That part of the judgment which refuses to order a hearing under section 128(a) is vacated. In all other respects, the judgment is affirmed. The case is remanded for further proceedings consistent with this opinion.

Judges KOELSCH, ELY and HUFSTEDLER do not concur in the portion of the opinion that holds that the district court may, on remand, consider whether there has already been substantial compliance with section 128(a). They would hold that there has not been such compliance.

WALLACE, Circuit Judge, Concurring:

I concur generally with the majority. I disagree that the case shoud be remanded for the district court to consider whether new hearings need now be held pursuant to 23 U.S.C. § 128(a). The question whether the hearings required by section 128(a) have been held is immaterial until the state highway department submits plans for a federal-aid highway project. At that time, section 128(a) requires that the state highway department "shall certify to the Secretary that it has had [the requisite] public hearings . . . ." If the state highway department decides not to

submit plans, the question never arises. Once it does submit plans, compliance with section 128(a) is necessary and appropriate judicial proceedings may be instituted to challenge the certification that required hearings have been held.

In the instant case, there has been no submission of plans and thus no certification. An action raising the question whether the hearings complied with section 128(a) is, therefore, premature. It is the responsibility in the first instance of the state highway department to hold such hearings as it deems necessary and to make the required certification to the secretary when it submits plans.

In addition, I cannot concur with the statements, which I deem to be dicta, pertaining to what constitutes further major federal action on this project. The majority concludes, without the benefit of briefs or argument, that certain actions are further major federal actions. I believe wisdom dictates that we wait before we make such a determination until a record raising this question is properly before us. It is at least equally arguable that once the final engineering design stage has been approved, all major federal action has been completed. At that point, the eventual impact on the environmental has been established. Each house that is moved, each mound of dirt that is excavated, each ribbon of concrete that is laid has an impact on the environment, but that impact is determined by the plan already adopted. Of course, the federal government will participate substantially in the project subsequent to the approval of the design plan, but participation alone is not enough. The real question is whether the government's continued participation constitutes "*further* major Federal actions having a significant effect on the environment." 36 Fed. Reg. 7727 (1971) (emphasis added). It can be persuasively argued that after final design approval, nothing *further* occurs which (1) is major and (2) has a significant effect on the environment, because no action outside the contemplation of the approved design is undertaken. Such an analysis is completely consistent with our previous holding in *San Francisco Tomorrow v. Romney*, 472 F.2d 1021, 1024-26 (9th Cir. 1973).

TRASK, Circuit Judge, with whom Circuit Judges WRIGHT, CHOY and GOODWIN join, Specially Concurring:

Part 2 of the opinion discusses "Public Hearings" that have been held, including a design hearing by the Washington State Department of Highways on June 2-6, 1970. In part 2c the opinion acknowledges the contentions of the State Defendants-Appellants that this hearing did comply with section 128(a) as amended, and that such hearing together with other meetings held by the Washington State Department of Highways with interested persons and groups constitutes substantial compliance with section 128(a) so that no further hearing should be required.

While the opinion leaves the question of the need for a further hearing to the District Court to consider on remand, it "suggests" that the District Court may feel "that the case can and should be disposed of more expeditiously by requiring a new hearing or opportunity for a hearing" of the type the opinion has discussed.

Lest the District Court might consider this language to constitute an admonition which would interfere with its freedom of decision, it should be pointed out that the record of the June 2-6, 1970, hearings has never been before us. None of us has examined it. No basis exists therefore upon which we can circumscribe the trial court's freedom of judgment in assessing the sufficiency of that record. The suggested admonition is predicated upon the fact that an appeal might be taken unless a new hearing is held. An appeal might also be taken if a new hearing is held. The evaluation of the sufficiency of the record to comply with the statutory requirements and regulations is for the trial court in the first instance. It should be exercised as in any other case without advice from this court as to the manner in which the decision should be made upon evidence we know nothing about.

CHAMBERS, Circuit Judge, concurring:

As a result of today's decision, the Secretary may no longer approve federal funding for any proposed federal aid highway project bypassing or going through a town or city unless the state has held a public hearing in compliance with 23 U.S.C. § 128(a), as amended. I concur in this result.

Section 128(a) itself requires the state to do nothing more than provide a structured forum for the public discussion of the possible social, environmental and economic impacts of a proposed highway location or design. On the other hand, the Secretary's regulations promulgated under § 128(a), in which we are now obliged to acquiesce, require the state to use that forum as a means of fully acquainting the public with such possible consequences.

Today's decision prescribes two sets of criteria for determining whether the state has met this requirement. First, the state must have furnished all information relevant to the considerations listed in 23 C.F.R. § 790.3(c)(1) through (c)(7). Because that list was not intended to be exclusive, we have decided that the state must also furnish any relevant information relating to those considerations normally contained in an Environmental Impact Statement, if those considerations are necessary to give the public a full acquaintance with the social, environmental and economic impacts of the proposal.

Anyone challenging the sufficiency of the information provided by the state has the burden of establishing that the information omitted was relevant to one of the prescribed considerations and that the information could reasonably have been expected to have had an impact on the decision making process. With this in mind, the district court is left to the task of determining whether the state complied with § 128(a), as amended.

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APPENDIX "D."

Memorandum and Order Granting in Part and Denying in Part Plaintiffs' Motion for a Preliminary Injunction.

Ralph W. Keith et al., Plaintiffs, v. John A. Volpe, as Secretary of Transportation, et al., Defendants. Civ. No. 72-355-HP.

United States District Court, C.D. California. July 7, 1972. Motion to Amend Denied Sept. 11, 1972.

PREGERSON, District Judge.

This suit was brought to halt work on the proposed Century Freeway until such time as the responsible federal and state officials comply with certain constitutional statutory, and administrative requirements which, plaintiffs contend, they have heretofore failed to satisfy. The matter came on for hearing on May 2, 3, 4, and 5, 1972, on plaintiffs' motion, filed pursuant to Rule 65 of the Federal Rules of Civil Procedure, for a preliminary injunction. Having studied the briefs, affidavits, and exhibits submitted by counsel prior to the aforesaid hearing, having heard the testimony offered and the arguments of counsel made at the aforesaid hearing, having studied the briefs and affidavits submitted by counsel after the conclusion of the hearing, and having studied the authorities cited by counsel, the Court has concluded that defendants have adequately complied with some of the aforementioned legal requirements, but have failed to comply with others. Therefore the Court will issue a preliminary injunction.

Plaintiffs herein are four couples who live in the path of the proposed freeway, the National Association for the Advancement of Colored People, the Sierra

Club, the Environmental Defense Fund, an unincorporated association named "Freeway Fighters," and the City of Hawthorne. Defendants herein are various state and federal officials and agencies. One group of defendants, sometimes referred to as "federal defendants," consists of John A. Volpe, the Secretary of the United States Department of Transportation; Sheridan A. Farin, the Administrator of Region 7 of the Federal Highway Administration, an agency within the Department of Transportation; and Donald E. Trull, the Division Engineer for the Federal Highway Administration in California. A second group of defendants, sometimes referred to as "state defendants," consists of the California Highway Commission; the California Department of Public Works; James A. Moe, the Director of the Department of Public Works; and Robert Datel, the State Highway Engineer of the California Division of Highways, an agency within the Department of Public Works. Plaintiffs contend that defendants have failed to comply with a federal environmental protection statute;[1] a California environmental protection statute;[2] federal statutes protecting homeowners, tenants, and businessmen who must relocate because of the construction of highways funded with federal aid;[3] and a federal statute requiring that public hearings be held prior to the construction of any federal-

[1]The National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347.

[2]The California Environmental Quality Act of 1970, Calif. Pub.Res.Code §§ 21000-21151.

[3]Chapter V of the Federal-Aid Highway Act of 1968, 23 U.S.C. §§ 501-511, and the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-4655. Plaintiffs also rely on the Urban Mass Transportation Act of 1964, 49 U.S.C. §§ 1601-1612, but concede that it does not technically apply to the Century Freeway.

aid highway.[4] Plaintiffs also charge that federal defendants are violating the due process clause of the Fifth Amendment to the United States Constitution and that state defendants are violating the due process and equal protection clauses of the Fourteenth Amendment.

A sketch of the proposed freeway is in order. If and when the Century Freeway is completed, it will, as presently planned, stretch a distance of 17 miles across the southern portion of the densely populated Los Angeles basin. It will connect the Los Angeles International Airport on the west with the San Gabriel River Freeway (Route I-605) on the east; it will also intersect with the San Diego, Harbor, and Long Beach Freeways (Routes I-405, 11, and 7, respectively). The freeway will traverse the cities of El Segundo, Hawthorne, Inglewood, Lynwood, South Gate, Paramount, Downey, and Norwalk, the Watts section of the City of Los Angeles, and unincorporated areas of Los Angeles County, including the communities of Willowbrook and Del Aire. Federal officials have designated the freeway as a part of the interstate highway system—specifically, Route I-105. Therefore 90% of the cost of the freeway will be borne by the federal government, although the California Division of Highways will actually acquire the right-of-way and construct the road. The total cost of acquiring the land and actually constructing the freeway has been estimated at $501,800,000. It has also been estimated that 9000 families, consisting of 21,000 individuals, will be displaced by the freeway and that 3900 single-family dwellings and

[4]Section 128(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 128(a).

3000 multiple-family dwellings will be acquired in order to clear the right-of-way.

The planning and design of a federal-aid highway is a lengthy process. The applicable statutes and regulations require a series of public hearings and, in addition, the submission by state officials of detailed proposals and assurances to officials of the Department of Transportation [hereinafter DOT] and the Federal Highway Administration [hereinafter FHWA] for approval. *See, e.g.*, the Federal-Aid Highway Act, 23 U.S.C. § 101 et seq.; the FHWA's Policy and Procedure Memorandum 20-8 (Jan. 14, 1969) [hereinafter PPM 28-8], 23 C.F.R. Part. 1, Appendix A; Lathan v. Volpe, 455 F.2d 1111, 1115-1116 (9th Cir. 1971). A public hearing on one aspect of the Century Freeway was held as long ago as June 1963, and the Division of Highways is now in the midst of acquiring the right-of-way for the freeway. According to the testimony of an official of the Division of Highways, as of approximately April 24, 1972, the Division had acquired 3388 parcels of land for the freeway, which represented 55.8% of the 6073 parcels that it intended to eventually acquire. It had acquired these parcels for a total of $88,651,000. In addition, the Division had reached agreements with the owners of 169 other parcels that were still in escrow. In one segment of the freeway corridor, however, the Division had already acquired 85.1% of the parcels, while in another segment it had only acquired 39.7%. A second official testified that as of approximately May 3, 1973, 2840 residences in the freeway corridor had been vacated. According to the testimony of a third official, the Division of Highways at present intends to begin actual con-

struction of the freeway during the third quarter of 1972 and to complete construction by the middle of 1977.

With that picture of the proposed freeway and of the work that has already been performed in mind, the Court will turn to the specific legal issues raised by this lawsuit.

The National Environmental Policy Act of 1969:

Nearly three years ago, in response to growing public concern with the deterioration of the nation's environment, Congress enacted the National Environmental Policy Act of 1969 [hereinafter NEPA], 42 U.S.C. §§ 4321-4347. The statute went into effect on January 1, 1970. Section 101 of NEPA, 42 U.S.C. § 4331, contains a declaration by Congress of a comprehensive national environmental policy. Section 102 (2)(C), 42 U.S.C. § 4332(2)(C), establishes a mechanism for carrying out that policy. It "authorizes and directs that, to the fullest extent possible," every agency of the federal government shall

> "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
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> "(i) the environmental impact of the proposed action,
>
> "(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
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> "(iii) alternatives to the proposed action,
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> "(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

> "(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

In the words of Judge Skelly Wright, "NEPA, first of all, makes environmental protection a part of the mandate of every federal agency and department." Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Comm'n, 146 U.S. App.DC. 33, 449 F.2d 1109, 1112 (1971). NEPA also established a Council on Environmental Quality [hereinafter Council], and in guidelines promulgated pursuant to NEPA that body stated,

> "The objective of section 102(2)(C) * * * is to build into the agency decision making process an appropriate and careful consideration of the environmental aspects of proposed action * * *." Statements on Proposed Federal Actions Affecting the Environment, 36 Fed.Reg. 7723, 7724, ¶ 1 (April 23, 1971).

[1, 2] To quote again from the *Calvert Cliffs'* decision, moreover,

> "* * * [T]he Section 102 duties are not inherently flexible. They must be complied with to the fullest extent, unless there is a clear conflict of *statutory* authority." 449 F.2d at 1115. [Emphasis in original.]

See also Daly v. Volpe, 350 F.Supp. 252 (W.D. Wash. 1972). The federal defendants have not filed the environmental impact statement required by Section 102 (2)(C), and plaintiffs insist that they must do so. Federal defendants concede that the construction of freeways with federal funds does constitute "major Federal actions, significantly affecting the quality of the

human environment," within the meaning of NEPA. They contend, however, that NEPA does not apply to projects that were in as advanced a state of completion as was the Century Freeway at the time that NEPA went into effect—*i.e.*, on January 1, 1970.

No provision of NEPA explicitly discusses the statute's applicability to projects that were already in existence on January 1, 1970, and "a volatile dispute in the law has emerged on the extent of which NEPA, and particularly Section 102(2)(C), applies to an ongoing project." Environmental Law Fund v. Volpe, 340 F.Supp. 1328, 1331 (N.D.Cal.1972).[5] The Council's guidelines promulgated pursuant to NEPA, however, address themselves to this question. They provide,

> "To the maximum extent *practicable* the Section 102(2)(C) procedure should be applied to further major federal actions having a significant effect on the environment even though they arise

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[5]Courts have refused to hold Section 102(2)(C) applicable to projects that were in existence on January 1, 1970, in Pennsylvania Environmental Council, Inc. v. Bartlett, 454 F.2d 613 (3d Cir. 1971); San Francisco Tomorrow v. Romney, 342 F. Supp. 77 (N.D.Cal. 1972); Environmental Law Fund v. Volpe, *supra;* Jicarilla Apache Tribe v. Morton, No. CIV 71-566-PHX-WCF, 3 ERC 1919 (D.Ariz., March 14, 1972); Citizens to Preserve Foster Park, Inc. v. Volpe, No. Civ. 71 F 71, 3 ERC 1031 (N.D.Ind., Aug. 18, 1971); Elliot v. Volpe, 328 F.Supp. 831 (D.Mass.1971); Brooks v. Volpe, 319 F.Supp. 90 (W.D.Wash. 1970), motion for rehearing denied 329 F.Supp. 118 (W.D.Wash. 1971), rev'd on other grounds 460 F.2d 1193 (9th Cir., 1972); Investment Syndicates, Inc. v. Richmond, 318 F.Supp. 1038 (D.Or.1970). Courts have held Section 102(2)(C) applicable to such projects in Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (4th Cir. 1972); Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Comm'n, *supra;* Named Individual Members of San Antonio Conservation Society, Inc. v. Texas Highway Dept., 446 F.2d 1013 (5th Cir. 1971); Morningside-Lenox Park Ass'n, Inc. v. Volpe, 334 F.Supp. 132 (N.D. Ga.1971); Nolop v. Volpe, 333 F.Supp. 1364 (D.S.D.1971); Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 728 (E.D.Ark.1971).

> from projects or programs initiated prior to enactment of the Act on January 1, 1970. Where it is not practicable to reassess the basic course of action, it is still important that further incremental major actions be shaped so as to minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program." Statements on Proposed Federal Actions Affecting the Environment, *supra,* 36 Fed.Reg. at 7727, ¶ 11. [Emphasis added.]

Federal defendants argue, in light of the Council's guidelines, the application of NEPA to the Century Freeway would not be practicable.

In November 1970 the FHWA promulgated interim regulations spelling out the circumstances under which that agency considered the application of NEPA to a freeway, the planning of which had commenced prior to January 1, 1970, to be appropriate. Interim Guidelines for Implementation of Section 102(2)(C) of the National Environmental Policy Act of 1969, ¶ 4 (Nov. 24, 1970) [hereinafter Interim Guidelines]. The key element in the FHWA's formula was the date or dates on which the highway in question received "design approval" from the FHWA—*i.e.,* the date or dates on which the FHWA approved the engineering design proposed by the state highway authorities, following public hearings, in accordance with PPM 20-8, ¶ 10. If the highway in question received design approval after February 1, 1971, compliance with NEPA would be necessary. If design approval was received before February 1, 1971—a date thirteen months after

NEPA went into effect—compliance with NEPA was *not* ordinarily necessary. The Interim Guidelines did require the state highway authorities to reassess highway projects that had received design approval before February 1, 1971, if those projects entailed the acquisition of substantial amounts of real estate. Interim Guidelines, ¶ 4c. This reassessment was to be performed "in consultation with" the FHWA division engineer, and its purpose was to determine whether the project had been "developed in such a manner as to minimize adverse environmental consequences." No Section 102(2)(C) statement was necessary, however, "unless requested by the division engineer." *Id.*

The state defendants divided the Century Freeway into eight segments for the purpose of preparing design proposals for submission to the FHWA. Design approval was obtained for three of those segments prior to January 1, 1970. Design approval for the remaining five segments was received between January 1, 1970, and February 1, 1971.[6] The Interim Guidelines, therefore, required only that the state highway authorities reassess the Century Freeway project. A reassessment, dated March 15, 1971, was prepared by the state defendants; it concluded that the Century Freeway project had been "developed in such a manner as to give detailed consideration to the potential impact upon the quality of the human environment * * *." The FHWA division engineer concurred in that evaluation

[6]Design approval for the eight segments was obtained on the following dates: August 14, 1968; September 10 and December, 23, 1969; February 12, April 14, July 2, December 1, and December 15, 1970. In addition, the design that received approval on September 10, 1969, was subsequently revised; the revisions received design approval on December 23, 1970.

on April 1, 1971.[7] The division engineer never requested a Section 102(2)(C) statement.

Federal defendants urge the Court to approve the decision not to require the preparation of a Section 102(2)(C) statement. This the Court cannot do, because the defendants have failed to satisfy NEPA's commandments.

[3] The message of NEPA is loud and clear. Section 101(a) declares that

> "it is the continuing policy of the Federal Government * * * to use all practicable means and measures * * * to create and maintain conditions under which man and nature can exist in productive harmony * * *"

Section 101(b) provides that in order to carry out this policy,

> "it is the continuing responsibility of the Federal Government to use all practical means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may * * * assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings * * *."

Section 102 of NEPA

> "authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [Section 101], and (2) all agencies of the

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[7] *See* Exhibit SS to Conrado affidavit, filed with the Court on April 7, 1972.

> Federal Government shall, [*inter alia,* prepare the environmental impact statements described in subsection (2)(C)]."

In light of the Congressional directive that "to the fullest extent possible * * * the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth" in Section 101 of NEPA, the Court believes that the application of NEPA to a federal-aid highway should not be considered impracticable until, as the Court of Appeals for the Fourth Circuit recently held, the highway "has reached the state of completion where the costs of abandoning or altering the proposed route would clearly outweigh the benefits therefrom." Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (4th Cir. 1972). The Century Freeway has not yet reached that state.

[4-7] The purpose of Section 102(2)(c) clearly is, in the words of paragraph 1 of the Council's guidelines, "to build into the agency decision making process an appropriate and careful consideration of the environmental aspects of proposed action * * *." *See also* DOT Order 5610.1, § 7(d) (Oct. 7, 1970); Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Comm'n, *supra,* 449 F.2d at 1113. The planning stage of a federally-funded highway ends when the highway receives design approval from the FHWA. *See* PPM 20-8, ¶ 10; *cf.* Wildlife Preserves, Inc. v. Volpe, 443 F.2d 1273 (3d Cir. 1971). Although the planning stage of the Century Freeway had commenced before January 1, 1970, it had not been completed by that date—*i.e.,* no design approval had yet been received for five of the eight segments of the highway.

The "agency decision making process," in other words, was still open when NEPA went into effect. The freeway, as a result, was still at that stage of its development in which a "careful consideration of the environmental aspects" would have been most "appropriate," and failure to comply with Section 102(2)(C) defeated the basic purpose of NEPA. Since five of the freeway's eight segments were still in their planning stage, moreover, the general judicial policy against the retroactive application of statutes—*see, e.g.*, Greene v. United States, 376 U.S. 149, 84 S.Ct. 615, 11 L.Ed.2d 576 (1964); Union Pacific R. Co. v. Laramine Stock Yards Co., 231 U.S. 190, 34 S.Ct. 101, 58 L.Ed. 179 (1913)—was inapplicable.

Judge Peckham recently observed, "Obviously, if the planning phase has not been completed, it is still *practicable* to file a statement." Environment Law Fund v. Volpe, *supra*, 340 F.Supp. at 1334. [Emphasis added.] Paragraph 4 of the FHWA's Interim Guidelines in actuality postponed the effective date of NEPA for thirteen months, except for cases in which the FHWA division engineer decided, apparently on the basis of a balancing of various environmental and non-environmental considerations, that preparation of a Section 102(2)(C) statement was appropriate.[8] NEPA

[8]In Environmental Law Fund v. Volpe, *supra*, Judge Peckham wrote,

> "Thus, even if a project were initiated prior to January 1, 1970, if the planning phase of the project did not take place until after January 1, 1970, a NEPA statement is required. No balancing of factors can be permitted in such a case; the state highway department *must* file a statement in compliance with Section 102(2)(C). However, if all the planning for a project took place *prior* to January 1, 1970—that is, if design approval preceded the passage of NEPA—a Section 102(2)(C) statement is required only if practicable.'" 340 F.Supp. at 1333. [Emphases in original; footnotes omitted.]

does not authorize such flexibility, and the provision emasculates both NEPA and the Council's guidelines.[9]

Judge Craven, the author of the opinion in Arlington Coalition on Transportation v. Volpe, *supra,* went further, holding Section 102(2)(C) applicable to a highway, the planning of which had been completed before January 1, 1970. After concluding that NEPA was "applicable to a project until it has reached the state of completion where the costs of abandoning or altering the proposed route would clearly outweigh the benefits therefrom," he added.

> "Manifestly the date of design approval alone does not accurately measure whether Arlington I-66 has reached the crucial stage, and determining the applicability of Section 102(C) by this standard alone would be *arbitrary and capricious agency action and an abuse of administrative discretion.* Administrative Procedure Act, 5 U.S.C.A. § 706(2)(A)." 458 F.2d at 1332 [Emphasis added.]

[9]In August 1971 the FHWA promulgated permanent regulations to replace the Interim Guidelines. Policy and Procedure Memorandum 90-1 (Aug. 24, 1971) hereinafter PPM 90-1]; *see especially* ¶ 5. The key element in the new formula is still the date or dates on which the highway in question received design approval from the FHWA. If the highway received design approval before January 1, 1970, compliance with NEPA is unnecessary; if it received design approval after February 1, 1971, compliance *is* necessary. If design approval was received during the thirteen month interval between January 1, 1970, and February 1, 1971, compliance with NEPA is required "if, in the judgment of the FHWA division engineer, implementation of [NEPA] *to the fullest extent possible* requires preparation and processing of an environmental statement." PPM 90-1- ¶ 5b. [Emphasis added.]

The precise thrust of ¶ 5 of PPM 90-1, insofar as it pertains to highways that received design approval between January 1, 1970, and February 1, 1971, is not clear. The phrase, "to the fullest extent possible," seems to establish a very strict standard for determining whether a Section 102(2)(C) statement is necessary. Other language in the paragraph, however, seems to undermine this tough standard. Before the FHWA division engineer can make the required determination, the state highway authorities must prepare, "in consultation with" the FHWA, a written reassessment of the highway in question. All that PPM 90-1 says about this reassessment is that it "should consider if the highway plans were developed in such a manner as to minimize adverse environmental consequences." PPM 90-1, ¶ 5c. Once the FHWA division engineer has received this reassessment, he makes the determination called for by ¶ 5b. In doing so, he must take into account a variety of environmental and nonenvironmental considerations. He

(This footnote is continued on next page)

In planning the Century Freeway, moreover, defendants made virtually no attempt to evaluate the effect of the highway on air pollution in the Los Angeles basin.[10] Paragraph 11 of the Council's guidelines provides that even when the application of NEPA to an ongoing project is not practicable, "[i]t is * * * important in further action that account be taken of environmental consequences *not fully evaluated at the outset of the project* or program." [Emphasis added.] "Air pollution," the Supreme Court recently observed, "is, of course, one of the most notorious types of public nuisance in modern experience." Washington v. General Motors Corp., 406 U.S. 109, 92 S.Ct. 1396, 1398, 31 L.Ed.2d 727 (1972). Air pollution in the Los Angeles basin is particularly obnoxious, and the major

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"should consider, in addition to the written reassessment prepared by the [state authorities], the status of the design; right-of-way acquisition including demolition of improvements within the right-of-way; number of families already rehoused and those yet to be rehoused; construction scheduling; benefits to accrue from the proposed highway improvement; significant impacts; and measures to minimize any adverse impacts of the highway." PPM 90-1, ¶ 5b.

Paragraph 5 of PPM 90-1 is, in short, ambiguous. If the test that it establishes for determining the applicability of Section 102(2)(C) is the phrase, "to the fullest extent possible," then the regulation is commensurate with the Court's interpretation of NEPA's demands. On the other hand, if the test is as flexible as the subsequent sentences in the paragraph suggest, the regulation would appear to suffer from the same shortcomings as did paragraph 4 of the FHWA's Interim Guidelines.

[10]*See, e.g.*, Interstate (Century) 105 Freeway: Design Team Concepts at 33, the summary of a study conducted for the California Division of Highways by Gruen Associates; it is dated December 1970. *See also* the testimony at the hearing on the motion for a preliminary injunction of Richard McMullin, a registered civil engineer with the Division of Highways and the head of the Division's Environmental Investigation Unit for District 7 (Tr. at 261-280).

cause of it is automobile emission.[11] Therefore the failure to closely examine the effect of the proposed freeway on air pollution was an egregious omission. It flew in the face of the Council's guidelines; the omission also undermines the state defendants' conclusion, reached during the course of the reassessment that they made pursuant to the FHWA's Interim Guidelines, that the Century Freeway was planned "in such a manner as to give detailed consideration to the potential impact upon the quality of the human environment * * *."

Defendants contend that when NEPA went into effect very little data was available comparing the effect of freeways and city streets on air pollution. Furthermore, defendants argue, the sparse evidence that was available at the time suggested that freeways reduced air pollution because automobile emission decreases at higher speeds.[12] Plaintiffs disagree; they contend that significant information on air pollution was available to defendants even before 1970.[13] The Court does not

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[11]Mr. McMullin testified that in his opinion automobile emission was responsible for approximately 50% of the air pollution throughout the country, but was the source of between 60% and 70% of the air pollution in the Los Angeles basin. He also testified that it was the contention of the Los Angeles County Air Pollution Control District that automobile emission caused 90% of the air pollution in Southern California (Tr. at 279).

[12]Mr. McMullin so testified (Tr. at 263-266). Air Quality Criteria for Carbon Monoxide, a study published by the United States Department of Health, Education and Welfare during March 1970, indicates that the emission of carbon monoxide does decrease at higher speeds. Plaintiffs apparently contend that the emission of certain other pollutants increases at higher speeds (Tr. at 277-278).

[13]Plaintiffs cite the following two articles: Bush, Urban Atmospheric Pollution, Civil Engineering—ASCF, May 1965, at 66; Schneiderman, Cohn, and Paulson, Air Pollution and Urban Freeways: Making a Record on Hazards to Health and Property, 20 Cath.U.L.Rev. 5 (1970).

believe it necessary, at least on the motion for a preliminary injunction, to decide which analysis of the availability of data is the more accurate one. As long as some information on air pollution was available, NEPA and the Council's guidelines obligated the federal defendants to prepare a Section 102(2)(C) statement examining, with as much precision as was possible at the time, the impact of the proposed freeway on air quality in the Los Angeles basin. Having failed to do so in 1970, the federal defendants must do so now.

In preparing their Section 102(2)(C) statement defendants should take full advantage of the advances made in air quality measurement since 1970. The available information about air pollution and the techniques that had been perfected for measuring it may or may not have been inadequate in 1970, but considerable progress has been made since then, and defendants themselves deserve credit for some of it.[14] The Environmental Protection Agency [hereinafter EPA], acting pursuant to the Clean Air Act, 42 U.S.C. §§ 1857-1857*l*, has been promulgated primary and secondary ambient air quality standards for the following pollutants; sulfur oxides; particulate matter; carbon monoxide; photochemical oxidants; hydrocarbons; and nitrogen dioxide. 40 C.F.R. Part 50; 36 Fed.Reg. 22384 (Nov. 25, 1971). The primary standards define levels of air quality that the EPA deems "necessary, with an adequate margin of safety, to protect the public health," while the secondary standards define levels of air quality that the EPA deems "necessary to protect the public welfare from any known or anticipated adverse effects of a pollutant." 40 C.F.R. § 50.2(b). Appendices

[14] *See* the testimony of Mr. McMullin (Tr. at 265-267).

attached to these standards, moreover, describe in detail methods for sampling and analyzing each of the specified pollutants. The Court assumes that the EPA's standards will be useful to defendants in evaluating the significance of any changes in air quality that the freeway will cause and that the techniques described in the appendices will be useful in actually measuring these changes.

In evaluating the impact of the freeway on air quality in the Los Angeles basin defendants should take all relevant details into account. They should consider the effect of wind and weather conditions on the dispersal of pollutants, and they must not ignore the effect of other sources of pollution. In addition, they should consider the extent to which the freeway will draw more automobiles into the southern Los Angeles basin. This case is not one in which a proposed freeway will cross a rural area, leading inevitably to rapid development and sharp increases in automobile traffic, because the Los Angeles basin is already heavily developed. Nevertheless, the construction of the Century Freeway could conceivably draw new industrial and commercial facilities into the freeway's vicinity and lead, as a result, to a significant increase in automobile traffic. This possibility should not be ignored. Furthermore, although air pollution is the most obvious problem to be considered, it does not represent the only significant environmental impact of a freeway. Defendants should for example engage in a more thorough examination than has heretofore been conducted of the relationship between the freeway and noise pollution.[15]

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[15]*See, e.g.*, Interstate (Century) 105 Freeway: Design Team Concepts, *supra*, at 32-33.

[8] Section 102(2)(C) lists five general topics that an impact statement must consider. The third requirement—that the statement consider "alternatives to the proposed action"—is a crucial one. Without it a NEPA statement becomes an academic exercise. Defendants' statement should consider all possible alternatives to the proposed freeway, including changes in design, changes in the route, different systems of transportation and even abandonment of the project entirely. *See, e.g.*, Daly v. Volpe, *supra*. In order to be realistic, on the other hand, the statement cannot ignore the substantial amount of work and money that has already gone into the Century Freeway. As Judge Eisele wrote in Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F.Supp. 728 (E.D. Ark. 1971).

> "The Court is not suggesting that the status of the work should not be considered in determining whether to proceed with the project. It is suggesting that the degree of the completion of the work should not inhibit the objective and thorough evaluation of the environmental impact of the project as required by NEPA * * *. [A]s the Court interprets NEPA, the Congress of the United States is intent upon requiring the agencies of the United States government, such as the defendants here, to objectively evaluate all of their projects, regardless of how much money has already been spent thereon and regardless of the degree of completion of the work." 325 F.Supp. at 746.

See also Morningside-Lenox Park Ass'n, Inc. v. Volpe, 334 F.Supp. 132, 142 (N.D.Ga. 1971).

This last point must be stressed. What Sections 101 and 102 make clear is that NEPA requires more than

just the preparation of a statement. The Federal defendants must actually evaluate the wisdom of proceedings with the Century Freeway project in light of whatever environmental impact their studies reveal. NEPA, as was stated in *Calvert Cliffs*, "makes environmental protection a part of the mandate of every federal agency and department." The requirement of Section 102(2)(C) that a statement be prepared merely ensures that this evaluation is conducted.

Further work on the freeway, in short, will be enjoined until the federal defendants conduct this evaluation and prepare a Section 102(2)(C) statement.

The California Environmental Quality Act of 1970:

On September 18, 1970, nine months after NEPA went into effect, the Governor of California signed into law the Environmental Quality Act of 1970 [hereinafter CEQA], Calif.Pub.Res.Code §§ 21000-21151. Sections 21000 and 21001 contain declarations of policy closely reminiscent of Sections 101 and 102 of NEPA. Section 21100 of CEQA follows Section 102 (2)(C) of NEPA almost verbatim. It provides,

> "All state agencies, boards, and commissions shall include in any report on any project they propose to carry out which could have a significant effect on the environment of the state, a detailed statement by the responsible state official setting forth the following:
>
> "(a) The environmental impact of the proposed action.
>
> "(b) Any adverse environmental effects which cannot be avoided if the proposal is implemented.
>
> "(c) Mitigation measures proposed to minimize the impact.

"(d) Alternatives to the proposed action.

"(e) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.

"(f) Any irreversible environmental changes which would be involved in the proposed action should it be implemented."

The state defendants have not prepared the statement required by Section 21100; they insist that they need not do so because CEQA is not applicable to projects that were in as advanced a state of completion as was the Century Freeway at the time that CEQA became law. Plaintiffs, on the other hand, maintain that the state defendants must file the statement.

[9] The resemblance between NEPA and CEQA is so uncanny that the conclusion is inescapable that CEQA was deliberately modelled after NEPA. Therefore the same considerations ought to govern the applicability of both statutes to the Century Freeway. Section 21001 of CEQA provides, in part,

"* * * [I]t is the policy of the state to:

"(a) * * * [T]ake *all action necessary* to protect, rehabilitate, and enhance the environmental quality of the state.

"(b) Take *all action necessary* to provide the people of this state with clean air and water * * * and freedom from excessive noise. * * *

"(g) *Require* governmental agencies at all levels to consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment." [Emphases added.]

Section 21001 demonstrates a commitment by California to the careful evaluation of the likely environmental impact of proposed public works projects before those projects are actually constructed.[16] In light of this language the Court believes that compliance with CEQA does not become unnecessary until a proposed highway "has reached the state of completion where the costs of abandoning or altering the proposed route would clearly outweigh the benefits therefrom." Arlington Coalition on Transportation v. Volpe, *supra*. The Century Freeway, as was pointed out in the Court's discussion of NEPA, has not reached that stage.

[10] At the time that CEQA entered into effect—*i.e.*, on September 18, 1970—the state defendants had not yet received design approval from the FHWA for two of the eight segments of the Century Freeway. State defendants, in fact, were apparently still engaged in the planning of those two segments, because they had not yet submitted their proposals for the segments

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[16]Section 21102 of CEQA provides,

> "No state agency, board, or commission shall request funds, nor shall any state agency, board, or commission which authorizes expenditures of funds * * * authorize funds for expenditure for any project, other than a project involving only planning, which could have a significant effect on the environment unless such request or authorization is accompanied by a detailed statement setting forth the matters specified in Section 21100."

Relying on this provision, the state defendants argue that CEQA is only applicable to a project before funds are authorized for it. The California Highway Commission approved the initial financing of the Century Freeway with funds from the State Highway Fund on October 23, 1967. Therefore, the state defendants argue, it was too late to apply CEQA to the Century Freeway when the statute entered into effect.

The Court does not believe that the legislature intended to foreclose the application of CEQA to every project that received some funding prior to September 18, 1970. Section 21102 does not establish an exclusive deadline applicable even to projects the planning or financing of which began before CEQA's enactment.

to the FHWA for approval.[17] In addition, subsequent to the date on which CEQA became law, the state defendants submitted a proposal for revisions in the design of a third segment of the freeway to the FHWA for approval.[18] Because the planning of the Century Freeway was still in progress when CEQA entered into effect, compliance with Section 21100 was called for. Moreover, since the federal defendants are being required to prepare a NEPA statement, there is no reason why compliance with CEQA would be impracticable for the state defendants. The planning of a federal-aid highway requires close cooperation between state and federal authorities, and the state and federal defendants will assuredly collaborate in the preparation of the NEPA statement on the Century Freeway. The requirements of NEPA and CEQA are so similar that preparation of a CEQA statement should demand little additional work, and whatever inconvenience compliance with CEQA causes the state defendants should be negligible.

The Public Hearing Requirement:

[11, 12] When the state defendants began planning the Century Freeway, Section 128(a) of the Federal-Aid Highway Act, 23 U.S.C. § 128(a), required them to hold public hearings to consider the "economic effects" of constructing a freeway at the location that they proposed. The statute was amended on August 23, 1968, and several requirements were added to Section 128(a). The section now reads as follows; the requirements added in 1968 are italicized:

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[17]*See* Exhibits MM and OO to Conrado affidavit, filed April 7, 1972.

[18]*See* Exhibit PP to Conrado affidavit, filed April 7, 1972.

> "Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic *and social* effects of such a location, *its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community.*" [Emphases added.]

Regulations prepared by the FHWA pursuant to Section 128(a) expand upon the basic statutory requirement. *See* PPM 20-8, 23 C.F.R. Part 1, Appendix A. The FHWA regulations direct the state highway authorities to hold two sets of hearings. First, a "corridor public hearing" must be held before the state authorities select a proposed route location for submission to the FHWA for its approval. The purpose of this hearing is to ensure public participation "in the process of determining *the need for,* and the location of, a Federal-aid highway." PPM 20-8, ¶ 4a. [Emphasis added.] Second, a "highway design public hearing" must be held after the FHWA has approved the route location, but before the state authorities have selected a specific design proposal for submission to the FHWA for design approval. The purpose of this hearing is to ensure public participation "in the process of determining the specific location and major design features of a Federal-aid highway." PPM 20-8, ¶ 4b. The regulations also state that these hearings should provide "a public forum that affords a full opportunity for presenting views on * * * the social, economic, environmental, and

other effects" of alternate locations and designs. PPM 20-8, ¶¶ 4a(3) and 4b(3). In addition, paragraph 4c of PPM 20-8 lists twenty-three possible "social, economic, and environmental effects" that are relevant to the selection of routes and designs for proposed highways.[19]

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[19]PPM 20-8, ¶ 4c, provides,

" 'Social, economic, and environmental effects' means the direct and indirect benefits or losses to the community and to highway users. It includes all such effects that are relevant and applicable to the particular location or design under consideration such as:

"(1) Fast, safe and efficient transportation.
"(2) National defense.
"(3) Economic activity.
"(4) Employment.
"(5) Recreation and parks.
"(6) Fire protection.
"(7) Aesthetics.
"(8) Public utilities.
"(9) Public health and safety.
"(10) Residential and neighborhood character and location.
"(11) Religious institutions and practices.
"(12) Conduct and financing of Government (including effect on local tax base and social service costs).
"(13) Conservation (including erosion, sedimentation, wildlife and general ecology of the area).
"(14) Natural and historic landmarks.
"(15) Noise, and air and water pollution.
"(16) Property values.
"(17) Multiple use of space.
"(18) Replacement housing.
"(19) Education (including disruption of school district operations).
"(20) Displacement of families and businesses.
"(21) Engineering, right-of-way and construction costs of the project and related facilities.
"(22) Maintenance and operating costs of the project and related facilities.
"(23) Operation and use of existing highway facilities and other transportation facilities during construction and after completion.

"This list of effects is not meant to be exclusive, nor does it mean that each effect considered must be given equal weight in making a determination upon a particular highway location or design."

The state defendants divided the Century Freeway into two segments for the purpose of conducting corridor public hearings. Two hearings were held for each segment—the first conducted by the Division of Highways and the second by the California Highway Commission. All four of these hearings were held before August 23, 1968, when the amendment to Section 128(a) went into effect.[20] The state defendants then divided the freeway into eight segments for the purpose of planning the highway design and securing FHWA approval for their design proposals. One segment received design approval from the FHWA on August 14, 1968.[21] Highway design public hearings for the remaining seven segments, however, were held after August 1968; these hearings, as a result, were subject to the amended version of Section 128(a).[22] The plaintiffs contend that these design hearings did not adequately consider the social and environmental effects of the Century Freeway and that neither the design hearings nor the corridor hearings provided an adequate opportunity for members of the public to present their views. Therefore the plaintiffs urge the Court to order the state defendants to hold new hearings that comply with Section 128(a) and PPM 20-8. The state defendants maintain

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[20]The two corridor hearings for the western segment of the freeway were held on June 5, 1963, and August 13, 1965. The two hearings for the eastern segment were held on March 30, 1967, and April 16, 1968.

[21]*See* Conrado affidavit, filed April 7, 1972. The affidavit does not indicate whether or not a highway design public hearing was held for that segment. It is not clear whether no hearing was held because a separate highway design hearing was not required at that time or whether a hearing was held but the affiant neglected to mention it in his affidavit.

[22]The seven design hearings were held on June 24, July 8, September 17, and October 15, 1969, and January 28, April 22, and May 13, 1970.

that the hearings that they conducted were quite satisfactory.

Having examined the transcripts of the hearings and the reports on the hearings submitted to the FHWA by the state defendants, the Court is not prepared to say that the hearings were totally inadequate in their consideration of the relevant social, economic, and environmental effects, nor that they provided an inadequate "public forum * * * for presenting views" on alternate locations and designs for the freeway. The hearings may not have been ideal, but as paragraph 4c of PPM 20-8 recognizes, each possible social, economic, or environmental effect need not necessarily "be given equal weight in making a determination upon a particular highway location or design." Nevertheless, the transcripts and the reports reveal that very little consideration was given to one of the most important of the Century Freeway's effects—*i.e.*, its effect on noise and air pollution. This effect is so crucial and the consideration given to it so minimal that the Court believes that further work on the freeway should be enjoined until the state defendants certify to the FHWA that they have held, or have provided an opportunity for, new public hearings focusing on the likely effect of the freeway on air and noise pollution.

The Court's conclusion leads to the question of whether both new corridor hearings and new design hearings are appropriate. Corridor hearings, according to the program established in paragraph 4 of PPM 20-8, precede design hearings and consider the broader issues: "the need for, and location of, a Federal-aid highway." Design hearings then consider more technical issues: "the specific location and major design features of a Federal-aid highway." The amended version of

Section 128(a)—the version that was in effect when seven *design* hearings were held on the Century Freeway—required those hearings to consider the environmental effects of the proposed highway. The administrative regulations that were in effect at that time specified that the hearings were to afford "a full opportunity for presenting views on major highway design features, including the * * * environmental * * * effects of alternate designs." PPM 20-8, ¶ 4b(3).[23] Since the applicable statutory and administrative provisions were not complied with insofar as they required consideration of the effects of the highway on air and noise pollution, new design hearings clearly are necessary.

The propriety of requiring new *corridor* hearings presents a more difficult question. When the corridor hearings on the Century Freeway were held, Section 128(a) had not yet been amended, and PPM 20-8 did not exist. The corridor hearings that the defendants held, in short, complied with the statutes and regulations that were in effect at that time. Despite this fact, the Court believes that new corridor hearings are necessary. Section 102(2)(C) of NEPA requires the federal defendants to prepare an environmental impact statement. If they are to do that in good faith, they must reconsider the entire Century Freeway project. Not only must they reexamine the specific route and design that they have proposed for the freeway, but they must also consider alternate means of transportation and even abandonment of the project entirely. Section 21100 of CEQA places similar demands on the state defendants.

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[23]PPM 20-8 was published in the Federal Register on January 17, 1969. 34 Fed.Reg. 728. The seven public hearings referred to in the text were conducted between June 1969 and May 1970. *See* n. 22, *supra*.

Since NEPA and CEQA demand a thorough reevaluation, it would make little sense to require the state defendants to seek the views and observations of the public on the design of the freeway, but to excuse them from consulting with the public on the broad issue that PPM 20-8 reserves for corridor hearings—*i.e.*, the issue of "the need for" the freeway. Section 128(a) demonstrates Congress' recognition of an important principle: that experts, regardless of their training, experience, and good faith, do not enjoy a monopoly on wisdom. Section 128(a) and PPM 20-8 establish a mechanism for securing public participation in the decision making process, and defendants should use that mechanism in evaluating the advisability of continuing with the Century Freeway. This conclusion "is compelled by the congressional directive in Section 102 of [NEPA] that '*to the fullest extent possible* * * * public laws of the United States shall be interpreted and administered in accordance with the policies' set forth in the declaration of policy [in Section 101 of NEPA.]" Arlington Coalition on Transportation v. Volpe, *supra*.[24] [Emphasis added.]

[13] The Court does not intend to lay down detailed instructions on the format or timing of the hear-

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[24]The required public hearings on the highway in question in *Arlington Coalition* had been held during 1958—five years before the first corridor hearing on the Century Freeway and ten years before the amendment to Section 128(a). Nevertheless, the Court of Appeals ordered the defendants to hold new public hearings. Judge Craven wrote, "We think that the requirements added to Section 128(a) apply to a highway ongoing at the effective date of the amendment if the costs of altering or abandoning the proposed location would not certainly outweigh whatever benefits might be derived therefrom." Judge Craven then stated, "As we have concluded * * * above [*i.e.*, in regard to NEPA], Arlington I-66 has not yet reached the critical stage of completion." 458 F.2d at 1337. The Century Freeway has not reached that stage either.

ings it has directed. A few observations should suffice. The Court does expect the state defendants to follow the basic procedure set forth in PPM 20-8—*i.e.*, to hold separate corridor and design hearings, with the corridor hearing or hearings preceding the design hearing or hearings. The decisions as to how many hearings are necessary or as to the number of segments, if any, into which the freeway should be divided for the purpose of conducting the hearings should be left to the sound discretion of the state defendants. In considering "the need for," the location of, and "the major design features of" the Century Freeway, the hearings should give special attention to the freeway's environmental impact, particularly its likely effect on air and noise pollution. Other "social, economic, and environmental effects" will also be relevant, however, because the decisions that the defendants must make during their reevaluation will have to be based on a balancing of the various costs and benefits of each alternative course of action.

[14] A final word is necessary. The defendants have argued that the plaintiffs are barred from seeking new public hearings by the equitable doctrine of laches. There has indeed been a very long interval between the earliest public hearings and the institution of this lawsuit by plaintiffs. While this delay has no doubt inconvenienced the defendants, that inconvenience does not outweigh the public's interest in assuring that the costs and benefits of the Century Freeway project are fully and deliberately considered by the responsible public officials.

The Relocation Statutes:

Construction of the Century Freeway will necessitate the acquisition by the California Division of Highways

of 3900 single-family dwellings and 3000 multiple-family dwellings; it will force 21,000 people to relocate. Many of these dwellings have already been acquired, and many individuals have already evacuated the freeway corridor.[25]

Federal law prohibits the FHWA from funding the construction of any federal-aid highway that will cause the displacement of persons living in the highway corridor unless the FHWA has received from the state highway authorities "satisfactory assurances":

(1) that "fair and reasonable relocation" payments for moving expenses and for "replacement housing" will be provided to persons who must relocate;
(2) that "relocation assistance programs" will be provided for such displaced persons; and
(3) that "within a reasonable period of time prior to displacement there will be available" adequate replacement housing.

These three basic requirements were initially contained in Chapter V of the Federal-Aid Highway Act of 1968 [hereinafter Highway Act], 23 U.S.C. §§ 501-511. *See* Section 502, 23 U.S.C. § 502. Chapter V was subsequently replaced by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 [hereinafter Relocation Act], 42 U.S.C. §§ 4601-4655, which applied the same basic requirements to highways and to all other federal and federal-aid projects that cause the displacement of people. *See* Section

[25] *See* the testimony of Robert Acorn, Assistant District Right-of-Way Agent with the Division of Highways (Tr. at 136-144), and the testimony of Frank M. Lentz, Senior District Right-of-Way Agent with the Division of Highways and the supervisor of the Division's relocation assistance program (Tr. at 230).

210, 42 U.S.C. § 4630. In enacting Chapter V of the Highway Act and later in replacing it with the more comprehensive Relocation Act, Congress intended to establish relocation policies that would, in the words of Section 501 of the Highway Act, 23 U.S.C. § 501, "insure that a few individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole." *Compare* Section 201 of the Relocation Act, 42 U.S.C. § 4621, which expresses the same thought in similar language.

Various sections of the two statutes provide relevant details about the three basic requirements that Section 502 of the Highway Act, 23 U.S.C. § 502, and Section 210 of the Relocation Act, 42 U.S.C. § 4630, impose upon state highway authorities. These sections merit fuller explanation:

(1) *The state authorities must assure the FHWA that they will provide "fair and reasonable relocation" payments.* Section 505 of the Highway Act, 23 U.S.C. § 505, and Section 202 of the Relocation Act, 42 U.S.C. § 4622, require the state authorities to reimburse displaced persons for moving expenses. The statutes also require supplemental payments to make up the difference between the compensation that a homeowner receives from the state for his old home and the purchase price necessary to obtain comparable replacement housing. In addition, the statutes require payments for the expenses incurred in securing title to a new home and for any increases in interest payments that are required to finance comparable replacement housing. In the case of a tenant, the statutes require payments for rental increases that are necessary to obtain comparable replacement housing. *See* Sections 506 and

507 of the Highway Act, 23 U.S.C. §§ 506, 507, and Sections 203 and 204 of the Relocation Act, 42 U.S.C. §§ 4623, 4624. Under the Highway Act the maximum that could be paid to a homeowner as a supplemental payment to make up the difference between his sale price to the state and the cost of replacement housing was $5000; the maximum sum that could be paid to a tenant to make up a rent differential was $1500. Under the Relocation Act a homeowner can receive a maximum relocation payment of $15,000 to cover both the difference between his sale price and the cost of replacement housing and his other relocation expenses; a tenant can receive as much as $4000 to cover a rent differential. *Id.* The federal government, in turn, reimburses the state for virtually all of these payments. *See* Section 504 of the Highway Act, 23 U.S.C. § 504, and Section 211 of the Relocation Act, 42 U.S.C. § 4631.

(2) *The state authorities must assure the FHWA that they will afford displaced persons "relocation assistance programs."* Section 508 of the Highway Act, 23 U.S.C. § 508, and Section 205 of the Relocation Act, 42 U.S.C. § 4625, require the state authorities to operate a relocation assistance program that will determine the needs of displaced persons and businesses for relocation assistance; assure that within a reasonable period of time prior to displacement adequate replacement housing will be available; assist the owners of displaced businesses in obtaining suitable replacement locations; and supply information concerning federal and state programs that offer financial assistance to displaced persons. The Relocation Act added two other significant requirements: the state's relocation assistance program must provide "current and continuing informa-

tion on the availability, prices, and rentals, of comparable decent, safe, and sanitary" replacement housing, and it must "provide other advisory services to displaced persons in order to minimize hardships to such persons in adjusting to relocation."

(3) *The state authorities must assure the FHWA that "within a reasonable period of time prior to displacement" adequate replacement housing will be available.* Such replacement housing must be located "in areas not generally less desirable in regard to public utilities and public and commercial facilities" than is the housing that must be evacuated; it must be available "at rents or prices within the financial means of the families and individuals displaced"; it must be "decent, safe, and sanitary"; it must be "equal in number to the number of and available to such displaced persons" as require such housing; and, except in certain cases authorized by FHWA regulations, it must be "reasonably accessible" to the places of employment of those displaced persons who require the housing. *See* Section 502(3) of the Highway Act and Section 205(c)(3) of the Relocation Act.

Plaintiffs contend that the defendants have failed to meet the requirements of the Highway Act and the Relocation Act. They allege several shortcomings; the Court will discuss each one separately.

Statewide *versus* Project Assurances

The FHWA promulgated comprehensive regulations pursuant to Chapter V of the Highway Act during September of 1968. Instructional Memorandum 80-1-68 (Sept. 5, 1968) [hereinafter IM 80-1-68]. After the Relocation Act became law, the FHWA promulgated similar regulations pursuant to that statute. Instruc-

tional Memorandum 80-1-71 (April 30, 1971) [hereinafter IM 80-1-71], 23 C.F.R. Part 1, Appendix A. In order to enable the FHWA to monitor the state highway authorities' compliance with the three basic requirements of Chapter V of the Highway Act, paragraph 5a of IM 80-1-68 provided, in part,

> "No State highway department shall be authorized to proceed with any phase of any project which will cause the displacement of any person * * * until it has furnished satisfactory assurances * * * that
>
> "(1) Relocation payments and services were or will be provided * * *
>
> "(2) In the event housing will not be available within a reasonable period of time prior to displacement * * *, the States shall provide a detailed statement specifying the respects in which such assurance cannot be furnished, the extent to which such housing will be available prior to displacement, the period of time prior to displacement when that housing will become available and an estimate of the additional time within which such housing will become available * * *.
>
> "(3) The public was or will be adequately informed of the relocation payments and services which will be available * * *.
>
> "(4) No person * * * shall be required to move from his home, farm or business location without at least 90 days written notice * * *.
>
> "(5) The State's relocation program is realistic and is adequate to provide orderly, timely, and efficient relocation of displaced individuals and families to decent, safe, and sanitary housing with minimum hardship on those affected."

By letter dated October 21, 1968, the California Division of Highways gave the FHWA division engineer assurances that purported to satisfy paragraph 5a of IM 80-1-68.[26] The FHWA notified the Division that its assurances complied with IM 80-1-68 by letter dated December 3, 1968.[27] Plaintiffs contend that these assurances referred to all federal-aid highway projects in California rather than specifically to the Century Freeway. In Lathan v. Volpe, *supra*, the Court of Appeals for the Ninth Circuit interpreted Section 502 of the Highway Act and IM 80-1-68 to demand specific assurances from the state highway authorities from the state highway authorities for each separate highway project rather than general assurances applicable to all projects in the state: "General statewide assurances and promises to comply for all federal-aid projects do not satisfy the specific requirements of 23 U.S.C. § 502 and * * * IM 80-1-68." 455 F.2d at 1120. Neither the Division's letter containing the assurances nor the FHWA's circular memorandum dated September 5, 1968, that requested that assurances be given mentioned the Century Freeway, although an attachment to the Division's letter did refer to it in explaining a particular provision of California law. It does appear from these documents, therefore, that the Division's assurances were merely "[g]eneral statewide assurances."

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[26]*See* Exhibit A to McElroy affidavit, filed with the Court on April 7, 1972. After the enactment of the Relocation Act and the promulgation of IM 80-1-71, the Division of Highways apparently gave the FHWA certain similar assurances. *See* Exhibit B to McElroy affidavit, *supra*. The record is not clear, however, as to whether these assurances reiterated all or part of the earlier assurances or whether they expanded upon the earlier assurances in any way.

[27]*See* state defendants' Exhibit BBB, filed with the Court on April 7, 1972.

[15] The *Latham* decision dealt with Section 502 of the Highway Act and IM 80-1-68—provisions that have been superseded by Section 210 of the Relocation Act and IM 80-1-71. The new provisions require the same basic assurances that their predecessors did. Paragraph 7 of IM 80-1-71 specifies, however, that project assurances are only necessary in regard to two points: the availability of replacement housing and the reasonableness and adequacy of the state's relocation program. Assurances on the remaining points may be given on a statewide basis. The Court believes that paragraph 7 of IM 80-1-71 represents a reasonable implementation of the Relocation Act and enables the FHWA to satisfactorily monitor a state's compliance with the Relocation Act for each specific federal-aid project in which it is engaged. Therefore the state defendants should give the FHWA project assurances on the two points for which IM 80-1-71 demands such assurances, and right-of-way acquisition for the Century Freeway should cease until the state defendants do so. In defending this lawsuit, however, both the federal defendants and the state defendants have insisted that adequate replacement housing is available and that the state's relocation program is reasonable and adequate. The Court assumes, as a result, that the appropriate specific project assurances will be promptly forthcoming and that the Court's ruling on this particular issue will have only a minimal effect on the Century Freeway project.

Relocation Payments and Services

Plaintiffs contend that the California Division of Highways, despite the assurances that it has given the FHWA, is not providing persons who live in the Century Freeway corridor with adequate relocation pay-

ments and services. The major part of the evidence that the parties herein have presented to the Court—both in the testimony of live witnesses and in affidavits submitted before and after the hearing on plaintiffs' motion for a preliminary injunction—has dealt with this issue. Plaintiffs have tried to demonstrate that the compensation that the state is paying for the homes that it must acquire and the supplemental payments and other relocation payments that the Division of Highways is providing do not permit persons who must relocate to purchase comparable decent, safe, and sanitary replacement housing. Plaintiffs have also tried to show that the Division is not adequately informing the public of the payments and services that the law requires, and that the Division fails to provide the required services even when members of the public request them. The Court, however, does not find the plaintiffs' evidence convincing.

[16] Plaintiffs' witnesses and affiants were, for the most part, persons living or maintaining businesses in the Century Freeway corridor or persons who had recently relocated. Defendants responded with the testimony and affidavits of several employees of the Division of Highways, including both supervisory personnel and the specific right-of-way agents who had represented the Division in its dealings with plaintiffs' witnesses. The right-of-way agents contradicted virtually all of the complaints voiced by plaintiffs' witnesses. What the evidence revealed, therefore, were differences of opinion between the right-of-way agents and the people living in the freeway corridor as to the value of the homes that the Division intended to acquire and as to the value of the homes that were available for replacement

housing.[28] Having heard the oral testimony and studied the affidavits that were offered, the Court is inclined to give greater credence to the testimony of the right-of-way agents who testified had been trained in real estate appraisal and had had significant experience working for the Division on right-of-way acquisition. Their training and experience did not, of course, entitle their testimony to unquestioning acceptance, but the Court was genuinely impressed with the caliber of the right-of-way agents who took the witness stand on behalf of defendant. Plaintiffs' witnesses, on the other hand, displayed considerable confusion as to what they were entitled to under the applicable law. The evidence also demonstrated significant failures on the part of plaintiffs' witnesses to understand information that the Division's right-of-way agents had diligently and in good faith attempted to convey to them. The evidence in support of plaintiffs' allegations was quite meager, and to order changes in the Division's relocation assistance program on the basis of it would be improper.

The FHWA regulations under both the Highway Act and the Relocation Act require the Division to provide relocation assistance through "personal contact" with displaced persons. *See* IM 80-1-68, ¶ 6d

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[28]The Highway Act and the Relocation Act do not require that the relocation supplements equal the difference between what the displaced person receives for his old home and what he pays for his replacement home; they require only that the payment equal the difference between what he receives for his old home and what comparable decent, safe, and sanitary replacement housing *ought to cost.* Section 506(a) of the Highway Act speaks of "the average price required for a comparable dwelling," and Section 203(a)(1)(A) of the Relocation Act speaks of the "reasonable cost of a comparable replacement dwelling." This detail may be responsible for some of the complaints of the plaintiffs' witnesses.

(3), and IM 80-1-71, ¶ 12a. The Division does establish personal contact with the people living in the Century Freeway corridor, and at the initial meeting with each family the right-of-way agent assigned to that case presents the family with a packet that contains a brochure explaining the relocation services and payments that are available and the means by which they may be obtained.[29] In addition, the FHWA regulations prohibit the Division from ordering anyone to vacate his home without ninety days' written notice. *See* IM 80-1-68, ¶ 5a(4), and IM 80-1-71, ¶ 7a(3). The Division also provides a thirty-day notice; since January 1971, however, it provides, along with the thirty-day notice, a list of three comparable decent, safe, and sanitary replacement homes that are available.[30] Paragraph 11 of IM 80-1-68 and paragraph 36 of IM 80-1-71, moreover, require state highway authorities to establish a system of appeals so that displaced persons can contest the adequacy of the relocation payments that they receive. The Division has established such a procedure, and in order for the Division to defeat a displaced person's challenge to the adequacy of his relocation payments, the Division must point to three comparable decent, safe, and sanitary

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[29]Two revisions of the brochure have been filed with the Court. The revision of November 18, 1968, forms a part of Exhibit 4 to the McElroy affidavit that was filed with the Court on May 11, 1972; the revision of October 1, 1971, was filed with the Court as state defendants' Exhibit III on April 7, 1972. *See also* the testimony of the following three right-of-way agents with the Division of Highways: Dennis Weik (Tr. at 44-45); Madeline Brown (Tr. at 80-81, 85-86, 88); Harold Binder (Tr. at 103-104). *Compare* the testimony of Prudence Wright, the owner of a rest home in Inglewood that the Division of Highways intends to acquire (Tr. at 27-29).

[30]*See* the Lentz affidavit, filed with the Court on April 7, 1972, at ¶ 10.

homes that are available to that person at a price that is no more than the sum of the compensation that he received from the state for his old home plus his supplemental relocation payments.[31] These procedures are all designed to ensure the adequacy of the payments and services that the Division provides, and from the evidence that has heretofore been presented to the Court, the Division appears to be following them.

The evidence that the plaintiffs have offered, in short, is so skimpy that the Court must conclude that the Division is providing adequate relocation payments and services, that it is adequately informing the public of the payments and services that are available, and that any incidents in which the Division has failed to do so have been isolated. It may be that plaintiffs will be able to prove the veracity of their allegations at a full trial on the merits. At the hearing on their motion for a preliminary injunction, however, they failed to demonstrate any shortcomings in the payments and services that the Division is providing under its relocation assistance program.

Availability of Replacement Housing

In order to ensure the accuracy of a state highway department's assurances that adequate replacement housing would be available "within a reasonable period of time prior to displacement," paragraph 7b of IM 80-1-68 required the state authorities, before they coud begin the acquisition of right-of-way for a freeway, to submit to the FHWA "for review and approval" a comprehensive study of the availability of replacement hous-

[31] *See* the testimony of Mr. Acorn (Tr. at 211); *cf.* the Lentz affidavit, filed on April 7, 1972, at ¶ 11.

ing in the general vicinity of the freeway. The report was to discuss the "methods and procedures by which the needs of every individual to be displaced [would] be evaluated and correlated with available decent, safe, and sanitary housing"; the "method and procedure by which the State [would] assure an inventory of currently available comparable housing which [was] decent, safe, and sanitary"; and an analysis of the inventory of the replacement housing that was available.[32]

The Division of Highways divided the Century Freeway corridor into five segments in order to prepare the replacement housing availability studies required by paragraph 7b of IM 80-1-68. Surveys were conducted during 1969;[33] reports were prepared and submitted to the FHWA "for review and approval" during that same year. The surveys produced detailed information on the needs of the people who would be displaced by the freeway: *i.e.*, on the number of people living in each segment of the corridor; the percentage of these people who wanted to relocate in the general vicinity of their old homes; and the market value of their homes or, in the case of people who rented housing, the number of rooms in and the monthly rent paid for their apartments. The Division of Highways also attempted to secure information about the replacement housing that was available in the vicinity of the freeway corridor—*i.e.*, its quantity and its market value or, in the case of rental housing, the monthly rent—and to correlate this information with the data on the needs of the people facing displacement. The Division of High-

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[32]Paragraph 15 of IM 80-1-71 contains almost identical requirements.

[33]*See* the Baker affidavit, filed with the Court on April 7, 1972, at ¶ 2.

ways also attempted to include in its studies analyses of special problems, such as the effect of racial discrimination on the availability of replacement housing for displaced blacks, the proximity to public transportation facilities of replacement housing for elderly people, and the impact of other public works projects on the relevant housing market. The surveys concluded that adequate decent, safe, and sanitary replacement housing in the vicinity of the freeway was available to people who wanted it at purchase or rental prices that were within their means. The FHWA accepted these conclusions. It approved each report, although in 1971 it requested an updated study on one segment of the corridor, and it granted the Division of Highways permission to begin acquiring real estate for the Century Freeway.[34]

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[34]The relevant dates for each housing study are as follows, beginning with the study for the westernmost of the five segments and progressing eastward: (1) The study for the segment between Sepulveda Boulevard and Vermont Avenue is state defendants' Exhibit EEE, filed with the Court on April 7, 1972; it is dated September 1969 and was approved by the FHWA on October 7, 1969 (*see* Exhibit U to Conrado affidavit, *supra*). The FHWA requested an updated study of this segment by letter dated March 1, 1971. The updated study is Exhibit HHH; it is dated June 21, 1971, and was approved by the FHWA on August 27, 1971 (*see* Exhibit VV to Conrado affidavit). (2) The study for the segment between Vermont Avenue and the Harbor Freeway is Exhibit CCC; it is dated April 9, 1969, and was approved by the FHWA on June 4, 1969 (*see* Exhibit N to Conrado affidavit). (3) The study for the segment between the Harbor Freeway and Mona Boulevard is Exhibit FFF; it is dated October 1969 and was approved by the FHWA on December 12, 1969 (see Exhibit X to Conrado affidavit). (4) The study for the segment between Mona Boulevard and Orange Avenue is Exhibit GGG; it is dated December 1969, and was approved by the FHWA on January 16, 1970 (*see* Exhibit BB to Conrado affidavit). (5) The study for the segment between the Los Angeles River and Studebaker Road is Exhibit DDD; it is dated August 6, 1969, and was approved by the FHWA on August 25, 1969 (*see* Exhibit R to Conrado affidavit).

[17] Plaintiffs contend that adequate replacement housing is not available and that the housing availability studies are inaccurate. The main target of their criticism is the way in which the Division of Highways calculated the number of homes that were available for purchase. In its studies of four of the five segments of the freeway[35] the Division calculated the number of houses that would become available to persons displaced by the Century Freeway during any one year by using the average annual turnover rate. In other words, the Division arrived at the number of houses that would become available in a given area during any one year by counting the number of owner-occupied residences that existed in the area and multiplying that figure by the percentage of houses in the area that are brought and sold during the average year. It then compared this figure to the number of persons displaced by the Century Freeway who could be expected to seek replacement housing in the same area during any one year.

The plaintiffs insist that turnover rates do not provide an accurate figure and that vacancy rates—*i.e.*, the percentage of homes that are actually vacant at any one time—provide the only accurate measure of availability. The Division of Highways defends its methodology by pointing out that virtually all houses that are sold in the Los Angeles area are sold while the seller is still living in the home. Assuming that the Division's point is well-taken, however, its use of turnover rates ignores the fact that other people besides those displaced by the Century Freeway may be expected

[35]The study for the segment between Vermont Avenue and the Harbor Freeway (Exhibit CCC) is apparently the only exception.

to seek housing in the relevant areas. It also ignores the fact that construction of the Century Freeway will necessitate the demolition of housing and, as a result, reduce the supply of housing in the relevant areas. The Relocation Handbook of the United States Department of Housing and Urban Development, it is interesting to note, states at chapter 4, page 4,

> "The use of turnover for relocation is not permissible. Turnover is a process, not a resource. It is the dynamic operation by which occupancy changes occur within a standing inventory over a period of time and theoretically could occur in the complete absence of vacancies, on a person-to-person basis."

The accuracy of the Division's figures on available housing is, in short, questionable.

The housing availability studies also have other shortcomings. Although the Division of Highways did determine the availability of rental housing by using vacancy rates rather than turnover rates, it failed in its studies on three of the five freeway segments to come up with data on the number of rooms in the available apartments; it merely divided the available apartments into categories based only on the monthly rent.[36] Nor is there any indication in the studies of how many of the available apartments were decedent, safe, and sanitary. All of this information is crucial to a complete picture of the available supply of appropriate replacement rental housing. There is, in addition, a significant mathematical error in the statistics on rental housing

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[36]Data on the number of rooms in the available apartments does appear in the study on the segment between Monda Boulevard and Orange Avenue (Exhibit GGG) and the updated study on the segment between Sepulveda Boulevard and Vermont Avenue (Exhibit HHH).

that are contained in the housing study on the segment of the freeway corridor between the Harbor Freeway and Mona Boulevard.[37] Furthermore, despite the Division's conclusion that adequate replacement housing would be available "within a reasonable period of time prior to displacement," the statistics in the updated study for the segment between Sepulveda Boulevard and Vermont Avenue actually indicate a shortage of one-bedroom apartments that rent for less than $80 per month,[38] and the statistics in the study of the segment between the Harbor Freeway and Mona Boulevard indicate a shortage in single-family residences in the $10,501—$15,000 range and in rental housing in practically all price ranges.[39]

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[37]*See* Exhibit FFF at p. 14. The state defendants calculated that 79% of the displaced people in that segment of the corridor probably wished to relocate in the same general vicinity. One hundred six apartment units renting for less than $60 per month were to be destroyed for the Century Freeway. Therefore 83 replacement units were needed, or 28 units per year for three years. The figures that appear at p. 14, however, are 53 replacement units needed (Col. II) or 18 units per year for three years (Col. III).

[38]*See* Exhibit HHH at p. 12.

[39]*See* Exhibit FFF at p. 8. The apparent inadequacies of the available housing supply in the vicinity of this segment of the freeway corridor may be the result of the rough measuring techniques used by the Division of Highways to gauge the demand for replacement housing. In all its studies the Division divided the displaced people into three categories: those who definitely wanted to relocate in the vicinity of their old homes: those who definitely did not want to relocate in the same area; and those who were not sure. The Division then added the percentage of those who definitely wanted to stay and the percentage of those who were not sure in order to gauge the percentage of the displaced people who desired replacement housing in the relevant area. In this particular segment of the freeway corridor, however, the percentage of those who definitely wanted to stay was extremely low—only 17%—and the percentage of those who were not sure was extremely high—62%. As a result, the total percentage used to gauge the demand for replacement housing—79%—may well have been unrealistically high.

[18] The significance of these shortcomings, however, is not clear. Subsequent to the completion of the housing availability studies, Congress enacted the Relocation Act, which increased the maximum relocation payments available to displaced persons to $15,000 for homeowners and $4,000 for tenants. Relocation payments of this size should bring many additional dwellings within the financial means of displaced persons. Both the Highway Act and the Relocation Act, moreover, authorize the construction of new replacement housing and the renovation of existing housing by the state highway authorities if adequate replacement housing will otherwise not be available. *See* Section 510 of the Highway Act, 23 U.S.C. § 510, and Section 206 of the Relocation Act, 42 U.S.C. § 4626. The severest housing shortage along the Century Freeway corridor appears to be in the Watts-Willowbrook area. The Division of Highways has sought to alleviate that shortage by moving homes from the vicinity of the Los Angeles International Airport onto vacant lots in the Watts-Willowbrook area. These homes were acquired by the state in eminent domain proceedings, and after they have been moved into Watts-Willowbrook, the state completely renovates them. The Division of Highways then makes them available to persons displaced by the Century Freeway. Only twenty-nine homes have heretofore been added to the housing supply in this way, but more will be built if there is a public demand for them.[40] The Division is also constructing 139 multiple-

[40] *See* the testimony of Mr. Acorn (Tr. at 114-125); *see also* the Gilbar affidavit and the Ralph declaration, filed with the Court on April 7, 1972.

As of the beginning of May 1972 nine of the twenty-nine homes that the Division of Highways had moved to Watts-Willowbrook and then renovated remained vacant. *See* the testimony

family units.[41] What these programs suggest is that regardless of the shortcomings of the housing availability studies, adequate replacement housing may well be available "within a reasonable period of time prior to displacement."

Having observed the employees of the Division of Highways who testified at the hearing on plaintiffs' motion for a preliminary injunction, the Court believes that these individuals are working very hard to ensure that no one will be displaced by the Century Freeway unless suitable replacement housing is available to him. The Court also believes that the relocation payments and the construction or revocation of replacement housing authorized by the Relocation Act do much to ensure that adequate housing will be available to persons displaced by the Century Freeway. Therefore, if this case were an ordinary suit for equitable relief, in which plaintiffs would be required to demonstrate the likelihood of ultimate success on the merits before they could secure a preliminary injunction, the Court would not hesitate to deny plaintiffs the temporary relief that they seek. This case, however, is not an ordinary one.

In Lathan v. Volpe, *supra*, the Court of Appeals for the Ninth Circuit faced the problem of deciding whether to issue a preliminary injunction in light of alleged violations of NEPA and of Chapter V of the Highway

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of Mr. Acorn (Tr. at 119). The parties disagree as to the significance of this fact. Plaintiffs contend that the houses remain vacant because they are small and are located on undesirable lots. *See, e.g.*, the testimony of Ward Davis, a homeowner in Watts (Tr. at 346). Defendants contend that the vacancies reflect the fact that displaced persons have found suitable replacement housing in the private housing market. *See* the testimony of Mr. Acorn (Tr. at 191-192).

[41] *See* the testimony of Mr. Acorn (Tr. at 127-128).

Act. The Court relied upon the Supreme Court's decision in United States v. City and County of San Francisco, 310 U.S. 16, 60 S.Ct. 749, 84 L.Ed. 1050 (1940), and refused to consider the likelihood of the plaintiffs' ultimate success. Quoting from that decision, the Court of Appeals stated,

> "* * * we are satisfied that this case does not call for a balancing of equities or for the invocation of the generalities of judicial maxims in order to determine whether an injunction should have issued." 310 U.S. at 30-31, 60 S.Ct. at 757.

The Court went on to declare,

> "The longer there is delay in applying Chapter 5 of the * * * Highway Act, * * * the fewer will be the residents of the corridor who receive the full benefit of the chapter. * * * In short, this is one of those comparatively rare cases in which, unless the plaintiffs receive *now* whatever relief they are entitled to, there is danger that it will be of little, or no value to them or to anyone else when finally obtained." 455 F.2d at 1116-1117. [Emphasis in original.]

No one can be completely sure, on the basis of the studies heretofore conducted, that the available replacement housing is adequate. For many of the people still living in the Century Freeway corridor the consequences of proceeding with the freeway in the face of an inadequate supply of replacement housing could be severe. The time to determine whether the shortcomings in the housing availability studies are significant is now. Therefore the Court believes that the most equitable course of action is to order the Division of Highways to conduct additional housing availability studies, and

further work on the freeway should be enjoined until the completion of those studies. The Court has already decided to enjoin further work on the Century Freeway until the defendants comply with NEPA and CEQA and until they hold additional public hearings. The shortcomings and uncertainties left by the existing housing availability studies should be resolved. The most efficient way to do that is to require the state defendants to conduct additional studies now—*i.e.*, at the same time that they comply with NEPA, CEQA, and Section 128(a) of the Highway Act.

The Court, it must be noted, is more concerned with the results of the additional studies than with the techniques used. All that the Court seeks is the alleviation of the major shortcomings of the existing studies: the failure to consider the fact that people other than those displaced by the Century Freeway will no doubt seek homes and apartments in the relevant housing markets; the failure to consider the fact that the construction of the freeway will necessitate the demolition of housing; and the failure to gather data on the number of rooms in many of the available rental units and the percentage of these units that are decedent, safe, and sanitary. The additional studies, however, should also consider the ameliorative effect of the increased relocation payments that were authorized by the Relocation Act subsequent to the conclusion of the existing studies and, in addition, the impact of the homes that will be added to the housing supply through the construction and renovation of replacement housing by the Division of Highways. Any sampling or measuring techniques that alleviate these shortcomings will be satisfactory.

The Constitutional Issues:

Plaintiffs contend that the public hearings that were held on the Century Freeway were so defective that the acquisition of real estate for the freeway right-of-way on the basis of those hearings violates the due process clauses of the Fifth and Fourteenth Amendments to the Constitution. They also contend that the housing market in Los Angeles County is so rigidly segregated and the available replacement housing is so limited that the displacement of black residents of the freeway corridor by the state constitutes a denial of equal protection of the laws in violation of the Fourteenth Amendment. In light of the relief that has been granted *pendente lite*, the Court does not consider it necessary to discuss these contentions at this point.

The Scope of the Relief Granted:

The Court's order does not determine the future of the Century Freeway. Whether or not it will ever be built remains for the appropriate federal and state administrative agencies to decide. The Court will issue a preliminary injunction in order to vindicate the important national and state policies established by NEPA, CEQA, Section 128(a) of the Highway Act, Chapter V of the Highway Act, and the Relocation Act. These statutes were enacted to protect the public interest.

[19] The people living or operating businesses in the freeway corridor will continue to live in a state of uncertainty for an unforeseeable period of time. Before the fate of the Century Freeway is finally resolved, some of these people will no doubt decide, for a variety of reasons, to sell their property to the only available purchaser—*i.e.*, to the State of California. Some, for example, may decide to move because their employer has

transferred them; others may simply tire of the uncertainty that they face. To force these people to remain in the freeway corridor would not be just. The preliminary injunction that the Court will issue, therefore, will be limited in this respect: the Division of Highways will remain free, upon satisfying the Court that a particular resident or businessman has freely and voluntarily decided to leave the freeway corridor, to appraise and acquire the real property of that resident or businessman and to provide that resident, be he homeowner or tenant, or that businessman, with the relocation payments and services to which he would be entitled under the law in the absence of this preliminary injunction. This exception will not, however, authorize the Division of Highways to acquire any real estate that it is presently precluded from acquiring under California law due to the fact that the City of Hawthorne has not signed a street closure agreement.

There is also a danger that vacant buildings, exposed utility lines, and similar by-products of the right-of-way acquisition process will become threats to the public health and safety during the period in which this preliminary injunction remains in effect. Therefore the Division of Highways will remain free, for good cause shown, to engage in such demolition or other work that is necessary to protect the public health and safety.

MEMORANDUM AND ORDER REGARDING MOTION TO ALTER OR AMEND PRELIMINARY INJUNCTION AND MOTIONS TO INTERVENE BY VARIOUS CITIES

On July 7, 1972, this Court issued a preliminary injunction halting work on the proposed Century Freeway until such time as the federal defendants prepare the environmental impact statement required by federal law and until such time as the state defendants prepare the environmental impact statement required by state law, hold additional public hearings, provide the federal defendants with the specific project assurances required by federal regulations, and conduct additional housing availability studies. The Court's order contains two exceptions. It permits the California Division of Highways, upon satisfying the Court that a resident or businessman has freely and voluntarily decided to leave the freeway corridor, to appraise and acquire the real estate of that person and to provide him with relocation payments and services. The Court's order also permits the Division, for good cause shown, to engage in any demolition work necessary to protect the public health and safety.

The magnitude of the Century Freeway project has necessitated—and will no doubt continue to necessitate—further orders by the Court implementing the preliminary injunction. On July 21, 1972, Judge Warren J. Ferguson of this Court, who handled my calendar at my request during my absence from the district, issued an order authorizing the following activities: (1) the removal from the freeway corridor of vacant houses that had been sold to third parties prior to the Court's order of July 7; (2) the closing of escrows that had been entered into between the State of California and

property owners prior to July 7, the payment of monies due pursuant to the terms of such escrows, and the payment of relocation assistance payments, provided that the affected property owners freely and voluntarily waived their right to cancel their escrows; (3) the continuation of work on those Ralph Act projects[1] in regard to which the Division had entered into commitments prior to July 7; and (4) the payment of relocation assistance payments to individiuals who had not yet relocated but who had received commitments from the Division prior to July 7. On August 4, 1972, Judge Ferguson, upon a showing by the Division that the affected property owners had freely and voluntarily decided to sell their property to the State of California, issued a further order authorizing the Division to proceed with five specific eminent domain actions then

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[1]The Ralph Act, Sections 135.3-135.7 of the California Streets and Highways Code, empowers the Department of Public Works, of which the Division of Highways is an agency, to provide relocation assistance to persons who reside in low-income areas and who are displaced by the construction of highways. The Act also empowers the Department to acquire land and housing, to refurbish existing housing, and to construct new housing, so that adequate decent, safe and sanitary replacement housing will be available to such displacees.

Section 135.3 declares, in part, that the Act's objectives

> "can best be achieved by enabling low-income persons in economically depressed areas affected by state highway construction to participate in the development and execution of the replacement housing program. Accordingly, when the initial replacement housing program is undertaken for the assistance of persons displaced by the construction of State Highway Route 105 in Los Angeles County [*i. e.*, the Century Freeway], such program shall be conducted in a manner conducive to maximum community participation, thereby assisting in alleviation of excessive unemployment by utilizing local labor and contributing to the development of training programs for unskilled labor."

In order to achieve these ends, Section 135.3 exempts "this initial replacement housing program" for the Century Freeway from "conventional contracting procedures, including competitive bidding."

pending in the state courts and to purchase five other specific parcels of real estate directly from the owners.

This matter came on for hearing again on August 28, 1972, on the state defendants' motion to alter or amend the preliminary injunction and on motions to intervene filed by the Cities of Downey, El Segundo, Inglewood, Lynwood, Paramount, and South Gate. The state defendants ask the Court to eliminate from the preliminary injunction the various requirements that it has ordered them to satisfy. They also ask, apparently in the alternative, that the Division of Highways be permitted to continue acquiring property in the proposed freeway right-of-way while the environmental impact statements required by the preliminary injunction are prepared. The state defendants also ask—again, apparently, in the alternative—that nine activities be exempted from the proscriptions of the preliminary injunction. The federal defendants join in the state defendants' motion, but only insofar as it asks the Court to eliminate the requirement of additional public hearings from the terms of the preliminary injunction.

The Motions to Intervene:

[20] As presently planned, the Century Freeway will pass through, *inter alia,* the cities of Hawthorne, Downey, El Segundo, Inglewood, Lynwood, Paramount, and South Gate. The Court has already permitted Hawthorne to intervene; the other aforementioned cities now seek to intervene, too. These cities have a very real interest in the future of the Century Freeway and in any orders by this Court regulating or prohibiting work on the freeway. The State of California has already purchased a considerable amount of real estate in these cities, and it plans to purchase more. The cities are en-

titled to intervene in this lawsuit as of right, pursuant to Rule 24(a) of the Federal Rules of Civil Procedure. The motions to intervene will be granted.

The Requirements Imposed by the Preliminary Injunction:

The Court will not eliminate from the preliminary injunction any of the requirements that it ordered the state defendants to satisfy. The Court issued a preliminary injunction because it concluded that the state defendants had failed to comply with federal and state environmental protection laws and with other legal requirements and that the public interest demanded prompt compliance with those provisions. In its July 7 order the Court discussed its reason for reaching these conclusions at length; the Court believes that, with one exception, additional discussion is unnecessary. Some further observations on the Court's reasons for ordering additional public hearings, however, would be useful.

In its July 7 order the Court stated that the public hearings that the state defendants had conducted had not been "totally inadequate in their consideration of the relevant social, economic, and environmental effects" of the proposed freeway and had not "provided an inadequate 'public forum * * * for presenting views' on alternate locations and designs for the freeway." The Court concluded, however, that the hearings had given only "minimal" consideration to one of the most crucial of the freeway's effects—*i.e.*, its effect on noise and air pollution. Therefore the Court ordered the state defendants to conduct additional design hearings. The federal defendants argue, in support of the state defendants' motion to alter or amend the preliminary in-

junction, that Section 128(a) of the Federal-Aid Highway Act, 23 U.S.C. § 128(a), requires only that "a public hearing be held or that an opportunity for a public hearing be afforded." (Federal Defendants' Memorandum in Support of Motion to Alter or Amend Preliminary Injunction, p. 1.) The federal defendants contend that

> "where, as here, public hearings were actually held and the public is afforded the opportunity to present its views regarding the economic, social and environmental effects of the freeway, the statutory requirement has been met even if the public did not utilize the opportunity to present views on particular subjects." (Federal Defendants' Memorandum, p. 2.)

[21] The Court believes that the public hearing requirement is broader in scope than the federal defendants contend. The state highway authorities must do more than merely permit members of the public to come to an auditorium and express whatever concerns they might have at the time. PPM 20-8, 23 C.F.R. Part 1, Appendix A, which implements Section 128(a), imposes upon the state authorities the responsibility to provide people who attend public hearings with information about the alternatives that exist. Paragraph 8a (3) of PPM 20-8 provides that the state highway authorities must notify the public, in advance of the hearings, that "maps, drawings, and other pertinent information developed by the State highway department * * * will be available for public inspection and copying" prior to the public hearings. Paragraph 8b(3) of PPM 20-8 provides,

> "At each required corridor public hearing, pertinent information about location alternatives studied

> by the State highway department shall be made available. At each required highway design public hearing information about design alternatives studied by the State highway department shall be made available."

The state defendants did not meet their obligations by simply convening hearings. Air and noise pollution is one of the social, economic, and environmental effects listed in paragraph 4c of PPM 20-8; information about the problem clearly is pertinent to the consideration of the design alternatives that are available on a given freeway project. The consideration given to air and noise pollution at the design hearings on the Century Freeway was inadequate not because the members of the public in attendance expressed little interest in the problem, but because little information about the problem was made available to the public. Therefore additional design hearings are appropriate.

In their papers in support of their motion for a preliminary injunction the plaintiffs launched a broad attack on the adequacy of the public hearings on the Century Freeway. This attack included severe criticism of the format of the hearings. Plaintiffs alleged that the way in which presentations by state officials and intermissions were scheduled discouraged the members of the public in attendance from presenting their views. Plaintiffs also contended that the refusal to accept questions other than at certain times and the refusal to accept questions on certain subjects had the same result. The Court, however, was not convinced by these criticisms of the format of the public hearings. With these criticisms in mind the Court stated in its July 7 order that it was "not prepared to say that the hearings

* * * provided an inadequate 'public forum * * * for presenting views' on alternate locations and designs for the freeway." (Memorandum and Order, p. 20.) The defendants apparently interpret this statement to mean that the public hearings constituted a completely adequate "public forum * * * for presenting views"—*i.e.*, that they fully complied with the requirements set forth in paragraph 4 of PPM 20-8. The Court, however, intended merely to say that it believed that the procedural details attacked by the plaintiffs—the timing of presentations, intermissions, and question periods, and the restrictions on the subject matter of the questions—did not render the hearings inadequate; the Court did not mean to imply that the hearings provided completely adequate public forums. The state defendants had the duty to provide the public with relevant information about the available alternatives, including information about the environmental effects of these alternatives. The consideration given at the hearings to the crucial issues of air and noise pollution was minimal, however, and in that respect the design hearings were not adequate.

The defendants also argue that no additional corridor public hearings are necessary, because the corridor hearings that they held complied with the statute and regulations that were in effect at the time. The Court disagrees. "The message of NEPA," the Court observed in its July 7 order, "is loud and clear." (Memorandum and Order, p. 9.) Both NEPA and CEQA require the defendants to prepare environmental statements. In doing so, the defendants must actually reevaluate the Century Freeway. They must consider, *inter alia*, "the environmental impact of the proposed action," especially its effect on air and noise pollution;

"alternatives to the proposed action," including other modes of mass transportation; and abandonment of the project *versus* continuation. *See* Section 102(2)(C) of NEPA. In short, they must reconsider, in the language of paragraph 4a(2) of PPM 20-8, "the need for" the Century Freeway.

NEPA itself contains no requirement of a public hearing. Under Section 128(a) and PPM 20-8, however, state highway authorities may not make decisions on basic issues such as "the need for" a highway until members of the public have had the opportunity to express their views at corridor public hearings. Section 128(a) and PPM 20-8 should, the Court believes, be applied to the reevaluation of the freeway that compliance with NEPA requires. NEPA and Section 128(a) are not independent of each other; they are both part of a structure of federal law designed to protect the environment. Both statutes demand that environmental issues be considered in the planning of federal-aid highways.[2] Section 128(a) stands for the proposition that members of the public have the right to be consulted—to obtain pertinent information and to express their views—on the important decisions that affect the construction of federal-aid highways. This is why additional corridor hearings are required.

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[2]The applicability of Section 128(a) and PPM 20-8 to the reconsideration of a federal-aid highway pursuant to NEPA finds support in the directive in Section 102 of NEPA that "to the fullest extent possible * * * public laws of the United States shall be interpreted and administered in accordance with the policies" set forth in Section 101 of NEPA. *See also* Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (4th Cir. 1972); *cf.* Ward v. Ackroyd, 344 F.Supp. 1202 (D.Md.1972).

Right-of-Way Acquisition Pending Compliance with NEPA and CEQA:

[22] As of April 24, 1972, the State of California had acquired 55.8% of the 6073 parcels of land that it intends to purchase in order to clear the proposed freeway corridor; by now it certainly owns many more parcels. The state defendants ask that they be permitted to continue acquiring right-of-way for the freeway, without any restrictions, pending the preparation of environmental impact statements in compliance with NEPA and CEQA. They contend that once the entire right-of-way has been cleared, it will be easier for the highway authorities to decide to abandon the freeway project, if such a decision is warranted, because it will be easier to dispose of the large blocks of real estate that the State will own at that point. The Court will not grant the state defendants such permission for two reasons.

The Court would anticipate that the more the defendants spend on the freeway—whether for land acquisition or for some other purpose—the more difficult it will be to decide to abandon the project. Proceeding with right-of-way acquisition, in short, would impede the objective reevaluation of the freeway project that NEPA and CEQA require.

The preliminary injunction is also designed to ensure that people now living in the freeway corridor will not be displaced until there are satisfactory guarantees that adequate replacement housing is available. The state defendants had concluded, prior to the Court's July 7 order, that adequate replacement housing was available, but the Court held in it July 7 order that the studies on which these conclusions had been based were inadequate. Therfore it ordered the state defend-

ants to conduct additional studies. After the preliminary injunction went into effect, the plaintiffs submitted to the Court a study of the housing market in Los Angeles County conducted by the county's Regional Planning Commission.[3] The study concludes that the county suffers from a serious housing shortage. In light of the danger that adequate replacement housing is not available, it would not be wise to permit the state defendants to purchase real estate from persons other than those who freely and voluntarily decide to sell to the state.

Exceptions to the Preliminary Injunction:

The state defendants ask that several types of activities be exempted from the proscriptions of the preliminary injunction. In regard to three of these activities the motion is moot: the order signed by Judge Ferguson on July 21 authorized the removal of houses that had been sold to third parties prior to July 7 and, under certain circumstances, the closing of escrows that had been opened prior to July 7 and the payment of relocation assistance payments; the state defendants indicated at the oral argument on the motion to alter or amend that they are satisfied with the scope of the July 21 order. Other portions of the state defendants' motion require further discussion.

The state defendants seek permission to proceed with "[p]ayments and contracts which provide for increased housing in the vicinity of the I-105." (State Defendants' Notice of Motion and Motion to Alter or Amend Preliminary Injunction, p. 2.) The order issued on July

[3]Los Angeles County Regional Planning Commission, Los Angeles County Housing Element (Oct. 1, 1971). Plaintiffs also submitted a summary of the study, entitled *Shelter*, which was published on July 1, 1971.

21 authorized the state defendants to proceed with Ralph Act projects in regard to which the state defendants had entered into commitments prior to July 7. The state defendants now seek blanket authorization to proceed with any future Ralph Act projects in which they may eventually decide to engage. The Court intends to consider future Ralph Act projects on a case-by-case basis, and it will deny the state defendants the blanket authorization for which they ask. They will be required to seek approval for each individual construction project. In light of the Court's preference for a case-by-case approach, it would be helpful if the Court explained its views in regard to such future construction. The Court anticipates that, barring evidence that has not yet been presented to it, it will look favorably upon requests for authorization to build additional housing. In considering the state defendants' request for permission to acquire additional right-of-way pending compliance with NEPA, the Court voiced the concern that the more the defendants spend in connection with the Century Freeway, the more difficult it will be to objectively reevaluate the freeway project. Plaintiffs may argue that this danger also applies to authorizing the state defendants to proceed with Ralph Act projects. The Court anticipates, however, that any additional funds spent on the construction of replacement housing will be small in comparison to the additional funds that might be spent on right-of-way acquisition. Therefore the Court anticipates that the construction of future replacement housing would have a minimal effect on the reevaluation of the freeway project. Furthermore, the Los Angeles County Regional Planning Commission's housing study, which was submitted to the Court by the plaintiffs, concludes that there is a

serious housing shortage in Los Angeles County. In light of the danger that this serious housing shortage exists, the Court does not anticipate that it would be in the public interest to enjoin the construction of additional housing. These thoughts are tentative, however, and are only intended to aid counsel in preparing to present or oppose any future motions regarding Ralph Act projects. The Court reserves any actual decisions on future Ralph Act projects until after the appropriate motions have been filed, briefed, and argued.

The state defendants also ask for permission to proceed with all eminent domain actions—regardless of whether or not the property owners consent—that were instituted prior to the temporary restraining order issued, with the consent of the defendants, on March 15, 1972. The Court will not permit the state defendants to acquire the property of any property owners who do not freely and voluntarily consent to the acquisition. The Court discussed its reasons at length in its July 7 order.

The state defendants seek authority to demolish or remove houses that become vacant, and to remove fixtures that are in danger of being vandalized, without obtaining authorization from the Court on a case-by-case basis. The City of Downey seeks enforcement of those provisions in its street-closure agreement with the Division of Highways that require the Division to promptly demolish such homes that it has acquired in Downey once they become vacant. The Court will not grant the blanket authorization that the state defendants and Downey seek. The Court recognizes that vacant buildings can become threats to the public health and safety; in its July 7 order the Court took this danger into account by authorizing the demolition, upon

good cause shown, of such buildings that do become threats to the public health and safety. In any event, the Court believes that proper procedures can be devised so that the demolition or removal of improvements can be considered expeditiously on a case-by-case basis. The blanket approval that the state defendants and the City of Downey seek might well impede the thorough and objective reevaluation of the Century Freeway that NEPA and CEQA demand.

[23] The state defendants also ask the Court to exempt from the preliminary injunction contracts that the Division of Highways entered into with outside agencies, prior to July 7, for planning the relocation of public utilities. The Court will not grant this request; there has been no showing that any significant harm will result from holding these contracts in abeyance while the preliminary injunction remains in effect. There is, furthermore, the danger that proceeding in any way with the freeway as presently planned will jeopardize the objective reevaluation that NEPA and CEQA require.

The Court realizes that the delay caused by the preliminary injunction will increase the cost of the Century Freeway if it is ever completed, temporarily inconvenience many individuals, and hinder the planning programs of several of the cities along the route of the freeway. It is necessary, however, to look to the ultimate benefit which hopefully will accrue to everyone living in the Los Angeles area from compliance with our federal and state environmental protection laws. The federal and state highway authorities have not complied; that is why a preliminary injunction is necessary.

The Court's order of July 7 was designed to protect both those property owners who desire to remain in the freeway corridor and those who freely and voluntarily decide to leave. The Court still believes that the best way to accomplish this end is to consider each parcel of land on a case-by-case basis—*i.e.*, to decide whether each property owner decided freely and voluntarily to sell his property. In light of the Court's preliminary injunction, of course, the State of California cannot purchase anyone's property unless it first satisfies the Court that the property owner is acting freely and voluntarily; the State, in short, must petition the Court for approval in each case. The Court has processed—and will continue to process—these applications for approval expeditiously. The state defendants may present these applications on an *ex parte* basis, as long as the plaintiffs receive actual notice of all hearing. The Court believes that these applications can be processed in as little as a few hours, or at most a day or two; the Court intends to ensure that any inconvenience that will be caused to property owners who freely and voluntarily decide to sell to the State will be minimal.

It is ordered that the motions to intervene of the cities of Downey, El Segundo, Inglewood, Lynwood, Paramount, and South Gate are granted.

It is further ordered that the state defendants' motion to alter or amend the preliminary injunction is denied.

United States District Court, Central District of California.

Ralph W. Keith, et al., Plaintiffs, v. John A. Volpe, as Secretary of Transportation, et al., Defendants. Civil No. 72-355-HP.

PRELIMINARY INJUNCTION

This matter having come on for hearing on plaintiffs' motion, made pursuant to Rule 65, F.R.Civ.P., for a preliminary injunction; and the Court having this day filed its Memorandum and Order, which constitutes the Court's findings of fact and conclusions of law, as authorized by Rule 52, F.R.Civ.P., and which grants in part and denies in part plaintiffs' aforesaid motion;

IT IS ORDERED that:

1. Defendants be and hereby are enjoined from any and all activities in furtherance of the Century Freeway, except for such activities as may be necessary for defendants to comply with this Preliminary Injunction and except for such activities that are specifically authorized by this Court pursuant to paragraph 3 of this Preliminary Injunction.

2. This Preliminary Injunction shall remain in effect until further order of this Court or until:

(a) defendants John A. Volpe, Sheridan A. Farin, and Donald E. Trull [hereinafter federal defendants] fully comply with the applicable requirements of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347;

(b) defendants California Highway Commission, California Department of Public Works, James A. Moe, and Robert Datel [hereinafter state defendants] fully comply with the applicable

requirements of the California Environmental Quality Act of 1970, Calif. Pub. Res. Code §§ 21000-21151;

(c) state defendants certify to defendant Volpe that they have held, or provided the opportunity for, additional public hearings on the Century Freeway, which hearings shall focus on the effect of the freeway on air and noise pollution, in accordance with Section 128(a) of the Federal-Aid Highway Act, 23 U.S.C. § 128(a), and PPM 20-8, 23 C.F.R. Part 1, Appendix A;

(d) state defendants submit to federal defendants the specific project assurances required by paragraph 7b of IM 80-1-71, 23 C.F.R. Part 1, Appendix A; and

(e) state defendants submit to defendant Trull, and defendant Trull approves, additional housing availability studies prepared in accordance with the instructions contained in the Court's Memorandum and Order of this date.

3. The provisions of paragraphs 1 and 2 of this Preliminary Injunction notwithstanding, defendants remain free

(a) upon satisfying the Court that any right-of-way of the Century Freeway has freely and voluntarily decided to leave the right-of-way, to appraise and acquire that person's real property and to provide him with the relocation assistance and payments to which he would be entitled under law if the Court had not issued this Preliminary Injunction; and

(b) for good cause shown, to perform such demolition or other work in or near the freeway

right-of-way as is necessary to protect the public health and safety.

4. The provisions of paragraph 3(a) of this Preliminary Injunction shall not authorize the defendants to acquire any real estate that they are presently precluded from acquiring under California law due to the fact that the City of Hawthorne has not signed a street-closure agreement.

Dated: July 7, 1972.

/s/ Harry Pregerson
Harry Pregerson
United States District Judge

APPENDIX E.

Statutes and Implementing Regulations.

Section 102(2)(c)
National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(c)).

Sec. 102. The Congress authorizes and directs that, to the fullest extent possible:

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

CEQ Guidelines for Preparation of Environmental Impact Statements
38 Fed. Reg. 20555-20556 (8/1/73).
Section 1500.9(d):

(d) *Public review.* The procedures established by these guidelines are designed to encourage public participation in the impact statement process at the earliest possible time. Agency procedures should make provision

for facilitating the comment of public and private organizations and individuals by announcing the availability of draft environmental statements and by making copies available to organizations and individuals that request an opportunity to comment. . . .

Agencies should devise methods for publicizing the existence of draft statements, for example, by publication of notices in local newspapers or by maintaining a list of groups, including relevant conservation commissions, known to be interested in the agency's activities and directly notifying such groups of the existence of a draft statement, or sending them a copy, as soon as it has been prepared. A copy of the draft statement should in all cases be sent to any applicant whose project is the subject of the statement. Materials to be made available to the public shall be provided without charge to the extent practicable, or at a fee which is not more than the actual cost of reproducing copies required to be sent to other Federal agencies, including the Council.

Section 1500.10:

§ 1500.10 Preparation and circulation of final environmental statements.

(a) Agencies should make every effort to discover and discuss all major points of view on the environmental effects of the proposed action and its alternatives in the draft statement itself. However, where opposing professional views and responsible opinion have been overlooked in the draft statement and are brought to the agency's attention through the commenting process, the agency should review the environmental effects of the action in light of those views and should make a meaningful reference in the final statement to the

existence of any responsible opposing view not adequately discussed in the draft statement, indicating the agency's response to the issues raised. All substantive comments received on the draft (or summaries thereof where response has been exceptionally voluminous) should be attached to the final statement, whether or not each such comment is thought to merit individual discussion by the agency in the text of the statement.

(b) Copies of final statements, with comments attached, shall be sent to all Federal, State, and local agencies and private organizations that made substantive comments on the draft statement and to individuals who requested a copy of the final statement, as well as any applicant whose project is the subject of the statement. Copies of final statements shall in all cases be sent to the Environmental Protection Agency to assist it in carrying out its responsibilities under section 309 of the Clean Air Act. Where the number of comments on a draft statement is such that distribution of the final statement to all commenting entities appears impracticable, the agency shall consult with the Council concerning alternative arrangements for distribution of the statement.

Section 1500.13:

§ 1500.13. Application of section 102(2)(C) procedure to existing projects and programs.

Agencies have an obligation to reassess ongoing projects and programs in order to avoid or minimize adverse environmental effects. The section 102(2)(C) procedure shall be applied to further major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act on January 1, 1970. While the status of the work and degree of completion

may be considered in determining whether to proceed with the project, it is essential that the environmental impacts of proceeding are reassessed pursuant to the Act's policies and procedures and, if the project or program is continued, that further incremental major actions be shaped so as to enhance and restore environmental quality as well as to avoid or minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program.

Federal Highway Administration Guidelines for Implementation of NEPA (PPM 90-1, 23 C.F.R. 1.38, Appendix "A", April 1, 1974).

Paragraph 5(b), 5(c):

b. An environmental statement or combined environmental/section 4(f) statement, whichever is appropriate, shall be prepared and processed in accordance with this memorandum for each highway section which received design approval on or after January 1, 1970, and before February 1, 1971, and which constitutes a major action significantly affecting the environment (see Appendix F, paragraphs 2 and 8) if, in the judgment of the FHWA division engineer, implementation of the National Environmental Policy Act to the fullest extent possible requires preparation and processing of an environmental statement. In making his judgment the FHWA division engineer should consider, in addition to the written reassessment prepared by the HA (see paragraph 5c) for each such highway section, the status of the design; right-of-way acquisition including demolition of improvements within the right-of-way; number of families already rehoused and those yet to be

rehoused; construction scheduling; benefits to accrue from the proposed highway improvement; significant impacts; and measures to minimize any adverse impacts of the highway.

c. Highway sections which received design approval on or after January 1, 1970, and before February 1, 1971, that are classed as a major action are to be reassessed by the HA in consultation with the FHWA division engineer or his representative. The written reassessment should consider if the highway plans were developed in such a manner as to minimize adverse environmental consequences.

PPM 90-1, ¶6(c); 23 C.F.R. 1.38, App. "A":

c. The draft environmental statement, including necessary section 4(f) information when required, is to be circulated by the HA to the appropriate agencies (see Appendix G) for comment, and made available to the public not later than the first required notice of location public hearing (30 to 40 days before date of hearing) or notice of opportunity for a public hearing as set out in PPM 20-8 (see Appendix H). If the highway section qualifies for exemption from public hearing procedures, a draft environmental statement, if required (including necessary section 4(f) information), is to be prepared and circulated for comment, and made available to the public as early as practicable. Regardless of whether or not there is a public hearing, a notice should be placed in the newspaper advising the public that the draft environmental impact statement is going to be circulated for review and comment. The notice should include information on where the statement is available for review and how copies can be obtained.

(1) The HA shall request a determination of significance from the section 4(f) lands agency and include

the letter requesting such determination and the determination, if received, as exhibits to the draft statement.

(2) An additional location or design public hearing will not be required for the sole purpose of presenting and receiving comments on the draft environmental statement for those projects which were processed in accordance with procedures in effect at the time.

(3) The comments received on the draft statement are to be made available at the HA office for public review.

PPM 90-1, ¶6(h), (i):

h. Similar procedures apply to highway sections which have received location approval but did not have design approval before February 1, 1971. In such instances the environmental statement, combination environmental/section 4(f) statement or negative declaration shall be prepared and processed during the design studies. The final environmental statement or negative declaration for such highway sections shall be furnished to FHWA before or with the request for design approval. If the design public hearing was held prior to the issuance of this memorandum, an additional design public hearing will not be required for the sole purpose of presenting and receiving comments on the draft statement. All other requirements for circulation for comment and availability to the public will apply.

1. The HA shall prepare a final environmental statement or combined environmental/4(f) statement in consultation with the FHWA for each project for which it prepared and circulated a draft environmental statement following the format in Appendix E. The final statement shall include a copy of all comments received and the consideration and disposition of environmental comments raised at the public hearing and

on the draft statement. The correspondence included in the final statement should contain marginal notes indicating where in the statement the comments are treated or discussed (any other suitable method of showing where the comments are discussed is satisfactory).

23 U.S.C. 103(e):

(e)(1) The Interstate System shall be designated within the United States, including the District of Columbia, and, except as provided in paragraphs (2) and (3) of this subsection, it shall not exceed forty-one thousand miles in total extent. It shall be so located as to connect by routes, as direct as practicable, the principal metropolitan areas, cities, and industrial centers, to serve the national defense and, to the greatest extent possible, to connect at suitable border points with routes of continental importance in the Dominion of Canada and the Republic of Mexico. The routes of this system, to the greatest extent possible, shall be selected by joint action of the State highway departments of each State and the adjoining States, subject to the approval by the Secretary as provided in subsection (e) of this section. All highways or routes included in the Interstate System as finally approved, if not already coincident with the primary system, shall be added to said system without regard to the mileage limitation set forth in subsection (b) of this section. This system may be located both in rural and urban areas.

23 U.S.C. 105(a):

(a) As soon as practicable after the apportionments for the Federal-aid systems have been made for any fiscal year, the State highway department of any State desiring to avail itself of the benefits of this chapter shall submit to the Secretary for his approval a program or programs of proposed projects for the utiliza-

tion of the funds apportioned. The Secretary shall act upon programs submitted to him as soon as practicable after the same have been submitted. The Secretary may approve a program in whole or in part, but he shall not approve any project in a proposed program which is not located upon an approved Federal-aid system.

23 U.S.C. 106(a):

Except as provided in section 117 of this title, the State highway department shall submit to the Secretary for his approval, as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto. In taking such action, the Secretary shall be guided by the provisions of section 109 of this title.

23 U.S.C. 128(a):

Any State highway department which submits plans for a Federal aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it

has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such highway. Such certification shall be accompanied by a report which indicates the consideration given to the economic, social, environmental, and other effects of the plan or highway location or design and various alternatives which were raised during the hearing or which were otherwise considered.

23 C.F.R. 790.3:

§ 790.3 Definitions.

As used in this part:

(a) A "corridor public hearing" is a public hearing that:

(1) Is held before the route location is approved and before the State highway department is committed to a specific proposal, except as provided in § 790.5(g).

(2) Is held to ensure that an opportunity is afforded for effective participation by interested persons in the process of determining the need for, and the location of, a Federal-aid highway; and

(3) Provides a public forum that affords a full opportunity for presenting views on each of the proposed alternative highway locations and the social, economic, and environmental effects of those alternate locations.

(b) A "highway design public hearing" is a public hearing that:

(1) Is held after the route location has been approved, but before the State highway department is committed to a specific design proposal, except as provided in § 790.5(g).

(2) Is held to ensure that an opportunity is afforded for effective participation by interested persons in the process of determining the specific location and major design features of a Federal-aid highway; and

(3) Provides a public forum that affords a full opportunity for presenting views on major highway design features, including the social, economic, environmental, and other effects of alternate designs.

(c) "Social, economic, and environmental effects" means the direct and indirect benefits or losses to the community and to highway users. It includes such effects that are relevant and applicable to the particular location or design under consideration as to:

(1) Regional and community growth including general plans and proposed land use, total transportation requirements, and status of the planning process.

(2) Conservation and preservation including soil erosion and sedimentation, the general ecology of the area as well as manmade and other natural resources, such as: park and recreational facilities, wildlife and waterfowl areas, historic and natural landmarks.

(3) Public facilities and services including religious, health, and educational facilities; and public utilities, fire protection and other emergency services.

(4) Community cohesion including residential and neighborhood character and stability, highway impacts on minority and other specific groups and interests, and effects on local tax base and property values.

(5) Displacement of people, businesses, and farms including relocation assistance, availability of adequate replacement housing, economic activity (employment gains and losses, etc.).

(6) Air, noise, and water pollution including consistency with approved air quality implementation plans.

FHWA noise level standards, and any relevant Federal or State water quality standards as set forth in Parts 770, 771, 772, and 773 of this chapter).

(7) Aesthetic and other values including visual quality, such as: "view of the road" and "view from the road," and the joint development and multiple use of space.

This listing is not meant to be exclusive, nor does it mean that each effect considered must be given equal weight in making a determination upon a particular highway location or design. (See § 790.8.)

(d) "Design approval" means that action or series of actions by which the FHWA indicates to the State highway department that the essential elements of a highway as set out in § 790.9 are satisfactory or acceptable for preparation of plans, specifications and estimates for actual construction (PS&E approval).

23 C.F.R. 790.5(d):

(d) With respect to a project on which a hearing was held, or an opportunity for a hearing afforded, before January 18, 1969, the following requirements apply:

(1) With respect to projects which have not received location approval:

(i) If location approval is not requested within 3 years after the date of the hearing or an opportunity for a hearing, compliance with the corridor hearing requirements is required unless a substantial amount of right-of-way has been acquired.

(ii) If location approval is requested within 3 years after the date of the hearing or an opportunity for a hearing, compliance with the corridor hearing requirements is not required.

(2) With respect to those projects which have not received design approval:

(i) If design approval is not requested within 3 years after the date of the hearing or an opportunity for a hearing compliance with the design hearing requirements is required.

(ii) If design approval is requested within 3 years after the date of the hearing or an opportunity for a hearing, compliance with the design hearing requirements is nevertheless required unless the Division Engineer finds that the hearing adequately dealt with design issues relating to major design features.

23 C.F.R. 790.5(g):

(g) With respect to any project for which a public hearing has been held under Federal-aid procedures, and for which it is determined by the State highway department and the Division Engineer that a new hearing is desirable to consider supplemental information on social, economic, or environmental effects relative to proposals presented at a previous public hearing or with respect to additional proposals, then, as appropriate, a new corridor or design hearing should be held. When recommended by the State and approved by the Division Engineer, a new corridor hearing held in accordance with this paragraph may be combined with the design hearing, whether or not a design hearing for the project has been previously held. In such instances, the location shall be reconsidered and a new request for location approval shall be submitted together with the request for design approval.

23 U.S.C. 109(h):

(h) Not later than July 1, 1972, the Secretary, after consultation with appropriate Federal and State officials, shall submit to Congress, and not later than 90

days after such submission, promulgate guidelines designed to assure that possible adverse economic, social, and environmental effects relating to any proposed project on any Federal-aid system have been fully considered in developing such project, and that the final decisions on the project are made in the best overall public interest, taking into consideration the need for fast, safe and efficient transportation, public services, and the costs of eliminating or minimizing such adverse effects and the following:

(1) air, noise, and water pollution;

(2) destruction or disruption of man-made and natural resources, aesthetic values, community cohesion and the availability of public facilities and services;

(3) adverse employment effects, and tax and property value losses;

(4) injurious displacement of people, businesses and farms; and

(5) disruption of desirable community and regional growth.

Such guidelines shall apply to all proposed projects with respect to which plans, specifications, and estimates are approved by the Secretary after that issuance of such guidelines.

23 U.S.C. 109(i):

The Secretary, after consultation with appropriate Federal, State, and local officials, shall develop and promulgate standards for highway noise levels compatible with different land uses and after July 1, 1972, shall not approve plans and specifications for any proposed project on any Federal-aid system for which location approval has not yet been secured unless he deter-

mines that such plans and specifications include adequate measures to implement the appropriate noise level standards. The Secretary, after consultation with the Administrator of the Environmental Projection Agency and appropriate Federal, State, and local officials, may promulgate standards for the control of highway noise levels for highways on any Federal-aid system for which project approval has been secured prior to July 1, 1972. The Secretary may approve any project on a Federal-aid system to which noise-level standards are made applicable under the preceding sentence for the purpose of carrying out such standards. Such project may include, but is not limited to, the acquisition of additional rights-of-way, the construction of physical barriers, and landscaping. Sums apportioned for the Federal-aid system on which such project will be located shall be available to finance the Federal share of such project. Such project shall be deemed a highway project for all purposes of this title.

23 C.F.R. 772.6(c)(1):

(c) Approvals to which compliance with noise standards is prerequisite:

(1) Projects for which location was approved prior to July 1, 1972: Compliance with noise standards shall not be a prerequisite to any subsequent approval provided design approval is secured prior to July 1, 1974. If design approval is not secured for such a project prior to July 1, 1974, compliance with the noise standards shall be a prerequisite to securing both design approval and approval of plans and specifications. However, such compliance shall not be a basis for requiring reconsideration of the highway location or any other approval action which has previously been taken for such projects.

23 C.F.R. 790.6(g):

(g) With respect to any project for which a public hearing has been held under Federal-aid procedures, and for which it is determined by the State highway department and the Division Engineer that a new hearing is desirable to consider supplemental information on social, economic, or environmental effects relative to proposals presented at a previous public hearing or with respect to additional proposals, then, as appropriate, a new corridor or design hearing should be held. When recommended by the State and approved by the Division Engineer, a new corridor hearing held in accordance with this paragraph may be combined with the design hearing, whether or not a design hearing for the project has been previously held. In such instances,

in the program submission (PR-1 or PR-9 forms and attachments), relative to the overall proposal being advanced, unless the Division Engineer determines that a more detailed report is warranted.

23 C.F.R. 795.4(d):

(d) These guidelines and the Action Plan shall only be applied to the future development of on-going projects and to future projects. They are not retroactive, and shall not apply to any step or steps taken in the development of a project prior to the time of the implementation of the parts of the Action Plan applicable thereto.

the location shall be reconsidered and a new request for location approval shall be submitted together with the request for design approval.

23 C.F.R. 790.8(b)(2)(v):

(v) Projects which have already received design approval, as defined herein, as of September 29, 1972, may receive PS&E approval, if, otherwise satisfactory, on the basis of past State highway department submissions which identify and document the economic, social, and environmental effects previously considered with respect to these advanced projects, together with a supplemental report, if necessary, covering the consideration and disposition of the items not previously covered and now listed herein in § 790.3(c). The supplemental report shall be prepared by the State and submitted to the Division Engineer not later than the time of submission of PS&E documents for the next Federal-aid improvement of the highway section. This supplemental documentation may take the form of statements

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented for Review	3
Statutes and Regulations Involved in the Case	3
Statement of the Case	6
A. District Court Proceedings	7
B. Court of Appeals Proceedings	15
Reasons the Petition for Writ of Certiorari Should Be Denied	19
A. The Decision of the Court of Appeals Is Correct	19
B. The Keith and Lathan Decisions Are Consistent With Other Cases	23
Conclusion	29

TABLE OF AUTHORITIES CITED

Cases — Page

Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323 (4th Cir. 1972) 12, 25

Jicarilla Apache Tribe v. Morton, 471 F.2d 1275 (9th Cir. 1973) 26, 27, 28

Keith, et al. v. Volpe, et al., 352 F.Supp. 1324 (C.D. Cal. 1972) 2

Monroe County Conservation Council v. Volpe, 472 F.2d 693 (2nd Cir. 1972) 25, 26

Ralph W. Keith and Esther May Keith, husband and wife, et al. v. California Highway Commission, Department of Public Works, et al., No. 72-3072 ..... 1, 19, 20, 22, 23, 24, 26, 27, 29

Roosevelt Lathan and Pearline Lathan, et al. v. Brinegar, et al., No. 72-2932 ..... 2, 18, 19, 20, 26, 29

Roosevelt Lathan and Pearline Lathan, et al. v. Washington State Highway Commission, et al., No. 72-2974 ..... 2, 18, 19, 20, 26, 29

United States v. SCRAP, 412 U.S. 669 (1973) 28, 29

Federal Register

36 Federal Register 7723 23

36 Federal Register 7727 11

Rules

Rules of the Supreme Court, Rule 23(5) 2

Statutes

California Public Resources Code, Secs. 21000-21174 7

Federal-Aid Highway Act, Sec. 106(a) 4

Page

Federal-Aid Highway Act, Sec. 128(a) .....3, 8, 10 .....13, 16, 17, 19, 20, 21, 23, 25, 26, 28, 29

Interstate Commerce Act, Sec. 15(7) 28

National Environmental Policy Act of 1969, Sec. 102 5

National Environmental Policy Act of 1969, Sec. 102(2)(C) 5, 10

United States Code, Title 23, Sec. 106(a) 4, 21

United States Code, Title 23, Sec. 128(a) 3, 8, 10

United States Code, Title 28, Sec. 1254(1) 2

United States Code, Title 42, Secs. 4321-4347 4

United States Code, Title 42, Sec. 4332 5

United States Code, Title 42, Sec. 4332(1) 22

United States Code, Title 42, Secs. 4601-4655 7

United States Code, Title 49, Sec. 15(7) 28

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-508

CALIFORNIA HIGHWAY COMMISSION, DEPARTMENT OF PUBLIC WORKS, *et al.*,

Petitioners,

vs.

RALPH W. KEITH and ESTHER MAY KEITH, husband and wife, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

This brief is submitted by respondents in opposition to the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in the case of *Ralph W. Keith and Esther May Keith, husband and wife, et al. v. California Highway Commission, Department of Public Works, et al.*, No. 72-3072, entered on September 27, 1974.

Opinions Below.

The opinion of the Court of Appeals has not yet been officially reported. It is appended to the petition for writ of certiorari, designated Appendix B. The opinion of the Court of Appeals in this case which was filed on December 3, 1973 and is appended to the petition for writ of certiorari, designated Appendix A, was

withdrawn by the order of the Court of Appeals on April 11, 1974 when it ordered a rehearing in banc in this case. Accordingly, this opinion is of no legal significance and has been inappropriately appended to the petition for writ of certiorari. The opinions and orders of the United States District Court from which petitioners appealed to the Court of Appeals were entered by the District Court on July 7, 1972 and September 11, 1972, and are officially reported in *Keith, et al. v. Volpe, et al.*, 352 F.Supp. 1324 (C.D.Cal. 1972). These opinions and orders are appended to the petition for writ of certiorari, designated Appendix D.

Jurisdiction.

Petitioners invoke the jurisdiction of this Court to review the judgment of the Court of Appeals entered on September 27, 1974 pursuant to 28 U.S.C. §1254(1).

Petitioners also seek to invoke jurisdiction of this Court to review the judgments of the Court of Appeals in the cases of *Roosevelt Lathan and Pearline Lathan, et al. v. Brinegar, et al.*, No. 72-2932 and *Roosevelt Lathan and Pearline Lathan, et al. v. Washington State Highway Commission, et al.*, No. 72-2974, entered on September 27, 1974, pursuant to 28 U.S.C. §1254(1) and Supreme Court Rule 23(5). Only if the defendants in the *Lathan* cases, the United States Department of Transportation and the Washington State Highway Commission, seek review on certiorari could a single petition for writ of certiorari be filed covering both the instant case and the *Lathan* cases. Petitioners herein have no right to petition for writ of certiorari on behalf of the defendants in the *Lathan* cases, and, to respondents' knowledge, such defendants have not petitioned this Court for writs of certiorari.

Question Presented for Review.

Whether the Court of Appeals erred in affirming the District Court's decision to grant a preliminary injunction prohibiting further activities by petitioners with respect to the proposed Century Freeway in Los Angeles until such time as they have certified that they have held or provided the opportunity for additional public hearings in connection with Section 128(a) of the Federal-Aid Highway Act, 23 U.S.C. §128(a).

Statutes and Regulations Involved in the Case.

The principal statutory provision of concern in this case is Section 128(a) of the Federal-Aid Highway Act, 23 U.S.C. §128(a), which provides as follows:

> "Any State highway department which submits plans for a Federal aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such

highway. Such certification shall be accompanied by a report which indicates the consideration given to the economic, social, environmental, and other effects of the plan or highway location or design and various alternatives which were raised during the hearing or which were otherwise considered."

The other important provision of the Federal-Aid Highway Act which is involved in the case is Section 106(a), 23 U.S.C. §106(a), which provides as follows:

"Except as provided in section 117 of this title, the State highway department shall submit to the Secretary for his approval as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto. In taking such action, the Secretary shall be guided by the provisions of section 109 of this title."

Other statutory provisions of the Federal-Aid Highway Act and their implementing regulations are also involved in the case. These statutes and regulations are appended to the petition for writ of certiorari, and are designated Appendix E.

Also applicable to this case is the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4347

(hereinafter referred to as "NEPA"). Section 102 of NEPA provides in pertinent part as follows:

> "The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
>
> ". . .
>
> "(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." (42 U.S.C. §4332.)

The detailed statement referred to in Section 102(2)(C) of NEPA is commonly called, and is hereinafter referred to as, an "environmental impact statement."

Statement of the Case.

This action concerns a proposed portion of the federal interstate highway system designated I-105, known locally in the Los Angeles area, and hereinafter referred to, as the Century Freeway. The proposed route of the Century Freeway extends from Los Angeles International Airport on the west through the densely populated Los Angeles basin for approximately 17 miles to the east, and traverses the Cities of El Segundo, Hawthorne, Inglewood, Lynwood, South Gate, Paramount, Downey and Norwalk, the Watts area of the City of Los Angeles and unincorporated areas in the County of Los Angeles. Most of the route passes through low and moderate income residential neighborhoods. Thus, if the Century Freeway is constructed, it will be necessary to acquire a total of approximately 3,900 single family homes and 3,000 multiple family dwelling units. This would result in the displacement of approximately 9,000 families, consisting of some 21,000 people. 352 F.Supp. at 1329.

Respondents in this action are eight individuals who live in the proposed route of the Century Freeway, on behalf of themselves and others similarly situated; the National Association for the Advancement of Colored People, representing the interests of its members living in the primarily black communities of Watts and Willowbrook; the Freeway Fighters, an unincorporated association representing the interests of its members opposed to the proposed route's westerly end; the City of Hawthorne, on behalf of its citizens who are overwhelmingly opposed to the proposed route through their City; and the Sierra Club and Environmental Defense Fund, two national environmental organizations concerned about the environmental degradation which would result if the Century Freeway is constructed.

A. District Court Proceedings.

In their complaint, filed February 16, 1972, respondents named as defendants those federal officials primarily responsible for the administration of the federal-aid highway program, and those state agencies and officials primarily responsible for the planning and construction of highways in the State of California. The federal officials named as defendants in the complaint are hereinafter referred to as "federal defendants." The state agencies and officials named as defendants in the complaint are the petitioners herein and are hereinafter referred to as "petitioners."

The complaint contained five causes of action alleging statutory violations, as follows:

1. that by their failure to prepare and consider an environmental impact statement federal defendants had not complied with the requirements of NEPA, and regulations promulgated thereunder;

2. that by their failure to prepare and consider an environmental impact report petitioners had not complied with the requirements of the California Environmental Quality Act of 1970, Calif. Pub. Res. Code §§21000-21174 (hereinafter referred to as "CEQA");

3. that by their failure to prepare adequate housing availability studies and to provide specific assurances with respect to the adequacy of replacement housing federal defendants and petitioners had not complied with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§4601-4655 (hereinafter referred to as the "Uniform Relocation Act"), and regulations promulgated thereunder;

4. that by their failure to provide adequate relocation assistance federal defendants and petitioners had not complied with the requirements of the Uniform Relocation Act, and regulations promulgated thereunder; and

5. that by their failure to hold adequate public hearings federal defendants and petitioners had not complied with the requirements of Section 128(a) of the Federal-Aid Highway Act, 23 U.S.C. §128(a), and regulations promulgated thereunder.

On February 16, 1972, respondents also filed a motion for preliminary injunction. Pending the hearing on this motion, respondents applied for a temporary restraining order, and this application was heard by the District Court on March 9, 1972. Following oral argument, the District Court ordered petitioners to refrain from evicting against their will anyone living in the route of the proposed Century Freeway and from instituting any new condemnation proceedings unless good cause was shown the Court.

Respondents' motion for preliminary injunction was heard for four days, from May 2 to May 5, 1972, during which the District Court received evidence and heard oral argument from all parties. At the hearing, it was disclosed that the total cost of the Century Freeway, if constructed, was estimated to be $501,-800,000. 352 F.Supp. at 1329. As the Freeway is part of the interstate system of federal-aid highways, it is anticipated that ninety percent of this cost will be paid for by the federal government. Petitioners testified that a little more than half the property had been acquired for the Freeway, at a cost to the State of California of

$88,651,000. 352 F.Supp. at 1329. As of the date of the hearing, however, petitioners had not commenced construction of the Freeway and had not sought or received federal defendants' approval of the plans, specifications and estimates for the Freeway.[1]

At the hearing, it was also disclosed that the proposed Century Freeway had been the subject of a series of public hearings. With respect to the western portion of the Freeway, route location hearings had been held by petitioners on June 5, 1963 and on August 13, 1965. Three months later, on November 17, 1965, petitioners approved the route location for the western portion. Thereafter, on April 22, 1968, federal defendants approved the route location for the westen portion. Route location hearings for the eastern portion of the Freeway had been held on March 30, 1967 and April 16, 1968. 352 F.Supp. at 1339. Following the latter hearing, petitioners approved the route location for the eastern portion, and it was subsequently approved by federal defendants on October 14, 1968.

For the purpose of planning design, petitioners divided the Century Freeway route into segments and held seven public hearings on June 24, 1969, July 8, 1969, September 17, 1969, October 15, 1969, January 28, 1970, April 22, 1970 and May 13, 1970. Federal defendants approved the design of these segments of the Freeway on August 14, 1968, September 10, 1969, December 23, 1969, February 12, 1970, April 14, 1970,

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[1]Because the preliminary injunction issued by the District Court is still in force, construction of the Century Freeway has never commenced and petitioners have never sought or received approval from federal defendants of the plans, specifications and estimates for the Freeway. Thus, the federal government has never been contractually obligated for the payment of its proportional share of the cost of the Century Freeway.

July 2, 1970, December 1, 1970 and December 15, 1970. The design of the segment that initially received approval on September 10, 1969 was subsequently revised and reapproved by federal defendants on December 23, 1970. 352 F.Supp. at 1332.

Following the hearing, on July 7, 1972, the District Court issued an extensive opinion and granted a preliminary injunction enjoining federal defendants and petitioners from all activities in furtherance of the proposed Century Freeway, except for such activities necessary to comply with the provisions of the injunction, until further order of the Court, or until:

(1) federal defendants complied with NEPA by preparing and considering the environmental impact statement required by Section 102(2)(C) of that Act;

(2) petitioners complied with CEQA by preparing and considering the environmental impact report required by that Act;

(3) petitioners held additional public hearings in connection with the proposed Century Freeway in accordance with Section 128(a) of the Federal-Aid Highway Act, 23 U.S.C. §128(a), and implementing regulations;

(4) petitioners submitted to federal defendants specific project assurances with respect to the adequacy of replacement housing required by the Uniform Relocation Act, and implementing regulations; and

(5) petitioners submitted to federal defendants housing availability studies prepared in accordance with the instructions contained in the District Court's opinion and order of July 7, 1972.

The preliminary injunction also provided that petitioners could acquire property in the route of the Cen-

tury Freeway upon satisfying the Court that the person living or maintaining a business on such property had freely and voluntarily decided to relocate. Finally, the injunction permitted petitioners, upon showing good cause to the Court, to perform demolition or other work in connection with the Century Freeway necessary to protect the public health and safety.

It became clear at the preliminary injunction hearing that at no time during the planning of the Century Freeway had federal defendants prepared and considered the environmental impact statement required by NEPA for "major federal actions significantly affecting the quality of the human environment," although they conceded that the Century Freeway is such an "action." 352 F.Supp. at 1330. Federal defendants contended that NEPA was not applicable because the Century Freeway had been initiated prior to January 1, 1970, the date NEPA became law, and was in an advanced stage of planning as of that date. They also argued that application of NEPA to the Century Freeway would not be practicable, relying on the following language of the guidelines promulgated by the Council on Environmental Quality:

> "To the maximum extent *practicable* the Section 102(2)(C) procedure should be applied to further major federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act on January 1, 1970." Statements on proposed Federal Actions Affecting the Environment, 36 Fed.Reg. 7723, 7727, ¶11 (Emphasis added) (hereinafter referred to as the "CEQ's Guidelines").

The District Court rejected these arguments, holding that federal defendants had failed to satisfy the strong declarations of Congress expressed in NEPA, and that application of NEPA to a federal-aid highway should not be considered impracticable until, as stated by the Court of Appeals for the Fourth Circuit in the case of *Arlington Coalition on Transportation v. Volpe,* 458 F.2d 1323, 1332 (4th Cir. 1972), the highway "has reached the state of completion where the costs of abandoning or altering the proposed route would clearly outweigh the benefits therefrom." The District Court held that the Century Freeway had not yet reached that state inasmuch as the planning stage had not been completed at the time NEPA was enacted. 352 F.Supp. at 1332. The Court held that the agency decision-making process was still open with respect to the Century Freeway when NEPA became law, and that the Freeway, as a result, was still at that stage of development in which a careful consideration of the environmental aspects would have been most appropriate. 352 F.Supp. at 1333. Moreover, because the Freeway was still in the planning stage when NEPA became law, the District Court specifically found that the general judicial policy against retroactive application of statutes was inapplicable. 352 F.Supp. at 1333.

Additionally, the District Court expressly disapproved of the Federal Highway Administration's regulations which operated to postpone the effective date of NEPA for 13 months (from January 1, 1970 to February 1, 1971), stating that NEPA did not permit such an emasculation of the Act and the CEQ's Guidelines. 352 F.Supp. at 1333. Finally, the District Court declared that "in planning the Century Freeway . . . defendants made virtually no attempt to evaluate the effect

of the highway on air pollution in the Los Angeles basin," and found this to be an "egregious omission" which "flew in the face" of the CEQ's Guidelines and undermined the defendants' conclusion that the Century Freeway was planned "in such a manner as to give detailed consideration to the potential impact upon the quality of the human environment." 352 F.Supp. at 1334.

Relying on analysis similar to that which it used in finding NEPA applicable, the District Court held that petitioners were required to comply with CEQA by preparing and considering an environmental impact report. The Court rejected petitioners' argument that CEQA was not applicable to the Century Freeway project, and stated that the "uncanny" resemblance between NEPA and CEQA dictated that the same considerations should govern the applicability of both laws to the project. 352 F.Supp. at 1337.

With regard to the issue whether additional public hearings were required, the District Court noted that Section 128(a) of the Federal-Aid Highway Act had been amended in 1968 to require consideraton of social effects, envvironmental impacts and consistency with urban planning. Prior to the 1968 amendments only economic effects were required to be considered. The Court examined the transcripts of all the hearings which had been held by petitioners and the reports which they had submitted to the Federal Highway Administration, and concluded as follows:

> ". . . the transcripts and the reports reveal that very little consideration was given to one of the most important of the Century Freeway's effects —i.e., its effect on noise and air pollution. This

> effect is so crucial and the consideration given to it so minimal that the Court believes that further work on the freeway should be enjoined until the state defendants certify to the FHWA that they have held, or have provided an opportunity for, new public hearings focusing on the likely effect of the freeway on air and noise pollution." 352 F.Supp. at 1339.

Finally, the District Court's opinion of July 7, 1972 addressed the problems of relocation assistance and replacement housing required under the Uniform Relocation Act. Although the Court found that respondents had failed to demonstrate shortcomings in petitioners' program of relocation assistance and payments for those people they had previously displaced from the route of the Century Freeway, it held that petitioners' studies relating to the availability of replacement housing were inadequate. 352 F.Supp. at 1346-49. Further, the Court held that petitioners had failed to give the type of assurances to federal defendants required by the Uniform Relocation Act, *i.e.*, specific assurances that adequate replacement housing was available for those people who would be displaced by the Century Freeway. 352 F. Supp. at 1344.

By motion filed on July 17, 1972, petitioners sought to alter or amend the preliminary injunction. On August 3, 1972, federal defendants joined in this motion. In support of their motion, petitioners urged the same arguments that they subsequently asserted in their appeal to the Court of Appeals; *i.e.*, that additional public hearings should not be required, that laches should be invoked to bar respondents' requested relief and that petitioners should not be enjoined from acquiring prop-

erty for the Century Freeway while the environmental impact statement and report and the housing availability studies were being prepared. This motion was argued by all parties on August 28, 1972.

On September 11, 1972, the District Court issued a second opinion, and specifically refused to alter or amend the terms of the preliminary injunction. 352 F.Supp. at 1354-57. Because of new arguments asserted by federal defendants, however, the Court clarified and reiterated its holding that petitioners were required to hold additional public hearings with respect to the Century Freeway.

B. Court of Appeals Proceedings.

On October 6, 1972, petitioners filed a notice of appeal to the Court of Appeals for the Ninth Circuit. Federal defendants filed a similar notice of appeal on November 9, 1972. The case was docketed in the Court of Appeals on December 7, 1972. Subsequently, on April 30, 1973, federal defendants moved to dismiss their appeal, and the Court of Appeals, on May 17, 1973, issued its order dismissing the appeal of federal defendants. Since the dismissal of their appeal, federal defendants have not been involved in any of the proceedings before the Court of Appeals or this Court. Since that dismissal, petitioners have been the only appellants in the Court of Appeals and are the only petitioners before this Court.

In their opening brief to the Court of Appeals, petitioners made it absolutely clear that they were *not* appealing the District Court's orders requiring compliance with NEPA, CEQA and the Uniform Relocation Act. By their appeal, petitioners only contested that portion of the District Court's orders requiring that they

hold additional public hearings complying with Section 128(a) of the Federal-Aid Highway Act with respect to the proposed Century Freeway. Thus, three of the four causes of action on which respondents prevailed in the District Court were never in issue before the Court of Appeals and are not now in issue before this Court, contrary to petitioners' bald assertion on page 6 of their petition for writ of certiorari that ". . . contrary to the opinions [sic] of the Circuit Court herein, all issues were before the Circuit Court."

In any event, despite this strange (and incorrect) statement by petitioners, the primary legal issue to which all parties have addressed themselves in the protracted proceedings before the Court of Appeals was the appropriateness of the District Court's orders requiring additional public hearings with respect to the Century Freeway.[2] In brief, these appellate proceedings may be summarized as follows:

1. On September 11, 1973, the case was argued before a three-judge panel of the Ninth Circuit sitting in San Francisco.

2. On December 3, 1973, a majority of this three-judge panel reversed those portions of the District Court's orders requiring additional public hearings. Circuit Judge Hamley filed a dissenting opinion in

[2]The only other legal issues which have been considered by the Court of Appeals were whether the District Court abused its discretion in (1) rejecting state defendants' asserted equitable defense of laches with respect to the appropriateness of additional public hearings, and (2) in seeking to maintain the status quo in connection with the proposed Century Freeway by issuing its preliminary injunction.

which he indicated that he agreed with the District Court and would have affirmed its orders. The majority and dissenting opinions are set forth in Appendix A of the petition for writ of certiorari.

3. On December 7, 1973, another three-judge panel of the Ninth Circuit Court of Appeals issued its decision in the cases of *Roosevelt Lathan and Pearline Lathan, et al. v. Volpe, et al.*, No. 72-2932 and *Roosevelt Lathan and Pearline Lathan, et al. v. Washington State Highway Commission, et al.*, No. 72-2974. The *Lathan* cases concerned a federal-aid highway in Seattle, and presented similar facts and the same legal issue which had been decided on December 3, 1973 in the instant case, *i.e.*, whether the Washington State Highway Department was required to hold additional public hearings complying with Section 128(a) of the Federal-Aid Highway Act. In a unanimous opinion, the three-judge panel in the *Lathan* cases decided, contrary to the result reached in the instant case, that such additional public hearings were required.

4. On April 11, 1974, upon the recommendation of a majority of each of the three-judge panels that decided the instant case and the *Lathan* cases on December 3, 1973 and December 7, 1973, respectively, and by vote of a majority of the active judges of the Ninth Circuit Court of Appeals, it was ordered that the assignments of each of the cases to the respective panels which had previously heard them were withdrawn and the opinions and judgments were withdrawn. The Court of Appeals also ordered that the two cases be reheard

together by the Court sitting in banc. This order of the Court of Appeals also provided as follows:

> "While all questions presented in each case will be open for consideration, the principal question to which the court will devote its attention is to whether the court should require that a new hearing be held pursuant to 23 U.S.C. §128(a), as amended, as the panel held in *Lathan v. Volpe*, or should hold that a new hearing need not be held, as a majority of the panel held in *Keith v. California Highway Commission*."

5. On June 12, 1974, the instant case and the *Lathan* cases were argued in San Francisco before the Court of Appeals sitting in banc.

6. On September 27, 1974, the Court of Appeals issued its opinions in the instant case and in the *Lathan* cases. In a decision approved by 12 of the 13 judges sitting in banc, the Court of Appeals affirmed the District Court's order enjoining activities in furtherance of the proposed Century Freeway until, among other things, additional public hearings are held to consider the effect of the Freeway on noise and air pollution. The Court of Appeals also stated that the environmental impact statement required by NEPA which is currently in preparation should be made available before, and considered at, the public hearings.

Thereafter, petitioners filed their petition for writ of certiorari with this Court. The petition was docketed in this Court on October 30, 1974.

REASONS THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

A. The Decision of the Court of Appeals Is Correct.

At the beginning of his opinion in the *Lathan* cases, Circuit Judge Duniway succinctly states the central legal issue and the main reason the Court of Appeals elected to rehear those cases and the instant case in banc, as follows:

> ". . . primarily to consider whether a new public hearing, under 28 U.S.C. §128(a), must be held before further actions are taken to carry out the construction of two portions of interstate freeways." *Lathan* at p. 2.[3]

In *Keith*, this legal issue was raised in connection with petitioners' appeal of that portion of the District Court's order enjoining activities in furtherance of the Century Freeway until such time as they certify to the federal defendants that they have held, or provided the opportunity for, additional public hearings which focus on the effect of the Century Freeway on air and noise pollution in accordance with Section 128(a) of the Federal-Aid Highway Act.

The Court of Appeals disposed of the *Keith* case in summary fashion, stating:

> "Under our decision [in the *Lathan* cases] it was proper for the court to condition lifting the injunction on a new hearing or hearings under sec-

[3]The complete opinions of the Court of Appeals in the instant case and in the *Lathan* cases, both decided September 27, 1974, are set forth in Appendices B and C, respectively, of the petition for writ of certiorari. All subsequent citations to these cases will refer to the name of the case and to the page on which the cited material appears in the appropriate appendix, *e.g.*, "*Keith* at 3" or "*Lathan* at 10."

> tion 128(a). Indeed, under [the decision in the *Lathan* cases], his order could have been considerably more broad than it is. The appellees, however, have not cross-appealed, and thus the only question before us is whether the portion of the preliminary injunction that . . . [requires new public hearings as a condition to terminating the injunction] . . . should be reversed. *Clearly, it should not.*" *Keith* at 4 and 5 (emphasis added).

Because of the Court of Appeals' reliance in the *Keith* case on its decision in the *Lathan* cases, it is necessary to discuss briefly the Court's reasoning in those cases.

The parties in the *Lathan* cases viewed the problem of whether additional public hearings were required under Section 128(a) as one of retroactivity. *Lathan* at 12. Thus, much of the argument centered on whether Congress, in amending Section 128(a) in 1968 to require that social effects, environmental impacts and consistency with urban planning must be considered at public hearings, intended to apply the amended statute retroactively to hearings which had been held prior to 1968. The Court of Appeals took a different approach, however, reasoning that application of the amended statute was *not* retroactive where the highway project is ongoing and where the federal government has not yet committed itself to provide funding for the proposed highway. *Lathan* at 12.

Federal financial commitment occurs *after* a state has certified that public hearings have been held in accordance with Section 128(a) (or an opportunity for such hearings has been afforded), and after it has

submitted, and the federal government has approved, its "plans, specifications and estimates" for a highway project. 23 U.S.C. §106(a). After approval of plans, specifications and estimates, a state is entitled to full reimbursement of the federal government's share of the project's costs if it has conformed to all applicable federal laws. Financial commitment comes at the end of a lengthy process of state actions and federal approvals. Since the Washington State Highway Department in *Lathan* had not applied for or received federal approval of plans, specifications and estimates for the Seattle highway project, the Court of Appeals, sitting as a court of equity, chose to apply the law in effect at the time of judgment (rather than that in effect at the time the action was filed). *Lathan* at 12. The Court stated its position as follows:

> "Moreover, we have no doubt that the Congress can require that there now be a hearing complying with amended Section 128(a) and with the policies of NEPA, *and we are of the opinion that it has done so.*" *Lathan* at 12 (emphasis added).

Construing the current language of Section 128(a) of the Federal-Aid Highway Act, the Court noted that the use of the present tense ("any State highway department which *submits* plans . . . shall certify to the Secretary that it has had public hearings . . .") indicated a Congressional intent to require that public hearings be held which comply with the statute in its present form. *Lathan* at 12 and 13. The adoption of NEPA strengthened the Court's view that the amended version of Section 128(a) was applicable to highway projects for which plans, specifications and estimates have not been approved. *Lathan* at 13. Moreover,

NEPA provides a source of information for the citizens attending hearings in the form of the required environmental impact statement (and which in the instant case is now being prepared by petitioners). The strong language directing that "to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies" of NEPA, 42 U.S.C. §4332(1), was construed by the Court of Appeals in *Lathan* as indicating Congressional intent to apply NEPA's concern for consideration of environmental consequences to ongoing highway projects. *Lathan* at 14. Thus, the Court holds:

> "In short, we hold under the facts here that the policies of NEPA and Section 128(a) must be construed together and that Section 128(a) provides a public forum at which, among other things, the NEPA required [environmental impact statement] will be a basis for the hearing." *Lathan* at 16.

Respondents submit that the *Keith* and *Lathan* decisions are clearly correct. They are supported by the facts, by the language of both the Federal-Aid Highway Act and NEPA, and by the policies underlying those statutes. As shown below, they are in agreement with the decisions of other circuits which have considered the issue. As the settled law of the Court of Appeals for the Ninth Circuit, having been fully briefed, argued, and reviewed by that Court in banc, the decision in *Keith*, read together with the decision in *Lathan*, defines with clarity the legal test that applied to the ongoing Century Freeway.

B. The Keith and Lathan Decisions Are Consistent With Other Cases.

In an effort to create a conflict of decisions with courts of appeals in other circuits, petitioners have cited several cases which they claim are in conflict with the decisions of the Court of Appeals in *Keith* and in *Lathan*. Respondents submit that, to the contrary, the decisions of the courts of appeals in other circuits which have ruled on the issue are consistent with the result reached by the Court of Appeals for the Ninth Circuit.

In the *Lathan* opinion, the Court of Appeals addresses the matter of consistency, and concludes that its decision is supported by cases in other circuits. This conclusion is set forth in a paragraph in which the Court discusses the effect of NEPA on the public hearing requirement of Section 128(a), and is worth quoting in its entirety.

> "Although NEPA itself does not provide for public hearings, its general directives contain one clear message: Environmental protection is a part of every federal agency's mandate; the Act requires 'agencies to *consider* environmental issues just as they consider other matters within their mandates.' *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, D.C. Cir., 1971, 449 F.2d 1109, 1112 (Emphasis in original) Section 128(a) provides the forum for doing so. In cases in which the Secretary has not given PS&E approval to a project, other Circuits have ordered new section 128(a) hearings. *Monroe County Conservation Council v. Volpe*, 2 Cir., 1972, 472 F.2d 693, 701-02; *Arlington Coalition on Transp. v. Volpe*, 4 Cir., 1972, 458 F.2d 1323, 1337-38." *Lathan* at 16 (emphasis in original).

In a footnote, the *Lathan* opinion goes into greater detail about the consistency of the *Lathan* and *Keith* decisions with other circuits, stating as follows:

> "While the court in *Arlington Coalition* states at one point that 'P. S. & E. approval has not yet been given,' 458 F.2d at 1332, the court at another point states that 'by July 28, 1966, acquisition-of-right-of-way agreements between the state highway department and the Secretary had been entered into for the entire project,' and the state had been reimbursed $28,679,123.07. *Id,* at 1328. The court therefore may have meant to say at p. 1332 that no PS&E approval *for construction* had yet been given.
>
> "In *Monroe County,* the state highway department had not yet submitted its plans, specifications and estimates, but it was undisputed that the federal government was prepared to give PS&E approval after submission; *see* 472 F.2d at 696.
>
> "Where the highway in question has actually been under construction, it has been held that the amendments do not apply. *Wildlife Preserves, Inc. v. Volpe,* 3 Cir., 1971, 443 F.2d 1273. That is not this case. *See also Ragland v. Mueller,* 5 Cir., 1972, 460 F.2d 1196, and *Pennsylvania Environmental Council, Inc. v. Bartlett,* 3 Cir., 1971, 454 F.2d 613, in which the courts held that NEPA did not apply to Federal-Aid Highway projects in cases in which PS&E approval had been given by the Secretary prior to January 1, 1970, and construction on the highways in question had begun as of the time the lawsuit was commenced. In *Ragland,* for example, sixteen of the twenty

> miles of the disputed highway had been fully completed as of January 1, 1970, the effective date of NEPA. *See also Citizens Environmental Council v. Volpe,* 10 Cir., 1973, 484 F.2d 870." *Lathan* at 16 and 17, footnote 28.

In *Arlington Coalition on Transportation v. Volpe,* 458 F.2d 1323 (4th Cir. 1972), the facts were similar to the instant case, except that the proposed highway project in that case was much closer to completion than the Century Freeway. In ruling that defendants must hold new public hearings, the Court said:

> "We think that the requirements added to Section 128(a) apply to a highway ongoing at the effective date of the amendment if the costs of altering or abandoning the proposed location would not certainly outweigh whatever benefits might be derived therefrom. Our conclusion is compelled by the congressional directive in Section 102 of [NEPA]." 458 F.2d at 1337.

Although the *Arlington* case used a different test, it is certainly not in conflict with the *Keith* and *Lathan* decisions, as evidenced by the Court of Appeals' discussion quoted above.

In *Monroe County Conservation Council v. Volpe,* 472 F.2d 693 (2nd Cir. 1972), the initial hearing on the highway project in question had been held in 1966. In holding that new hearings complying with the amended version of Section 128(a) must be held, the Court said that new hearings are required whenever federal approval of plans, specifications and estimates has not been given prior to the effective date of the 1968 amendment to Section 128(a). The court stated:

> "This rule is based upon the fact that a hearing is a condition precedent to the granting of federal aid, and, therefore, the Secretary must apply the statute which is in effect when he awards that aid. This concept is consistent with the federal policy which favors the advancement of environmental concerns, 42 U.S.C. §4332(1) [Section 102 of NEPA], and gives recognition to the importance of the hearings to proper decision making [citing *D.C. Federation of Civic Associations v. Volpe,* 434 F.2d 436, 441-42 (D.C. Cir. 1970)]." 472 F.2d at 701.

This is the conclusion reached by the Court of Appeals in the *Keith* and *Lathan* cases. Thus, hearings complying with Section 128(a) are required under the *Monroe County* test as well as under the more broadly stated, though not inconsistent, test applied in *Arlington.*

Petitioners also attempt to find a conflict within the Ninth Circuit, citing *Jicarilla Apache Tribe v. Morton,* 471 F.2d 1275 (9th Cir. 1973), as a decision in conflict with the *Keith* and *Lathan* cases. Of course, if there were a conflict, the *Jicarilla* decision would simply be superseded by the later, in banc ruling of the same court in *Keith* and *Lathan.* However, there is no such conflict. In holding that the policies of NEPA and Section 128(a) of the Federal-Aid Highway Act must be construed together and that Section 128(a) provides a public forum at which the environmental impact statement required by NEPA will be

part of the basis for the hearing, the Court of Appeals in *Lathan* specifically relied on *Jicarilla* as follows:

> "In so holding, we have the support of our own prior decisions, and of those of other circuits. We have held that agencies are not relieved of the obligation to evaluate the environmental consequences of their actions merely because a particular project was initiated before the effective date of NEPA *See Jicarilla Apache Tribe of Indians v. Morton,* 9 Cir., 1973, 471 F.2d 1275, 1282-83; *Lathan v. Volpe, supra,* 455 F.2d at 1120-21. With respect to ongoing projects, section 128 (a) and the regulations which implement it must be interpreted and administered, 'to the fullest extent possible,' in accordance with the policies of NEPA. In appropriate cases this may mean total reassessment of the project in light of its potential environmental impact, i.e., the consideration of its wholesale alteration or abandonment. *Cf. Jicarilla Apache Tribe of Indians v. Morton, supra.*" *Lathan* at 16.

The Court of Appeals' reliance on *Jicarilla,* as quoted above, is correct. Moreover, under no circumstances could the *Jicarilla* decision be considered to be in conflict with the central issues involved in *Keith* and *Lathan.* In *Jicarilla,* the Court of Appeals held that NEPA did not require public hearings to be held in connection with the construction of certain power plants. That is correct, since NEPA, *by itself,* does not require public hearings. However, *Jicarilla* does not stand for the proposition that public hearings are not required in

any case, since there was no statute involved in *Jicarilla* comparable to Section 128(a) of the Federal-Aid Highway Act which would have required public hearings with respect to power plant construction. Accordingly, respondents submit that petitioners' attempt to show a conflict of opinions within the Ninth Circuit completely misses the mark.

Finally, in their attempt to find a conflict of decision, petitioners rely on the case of *United States v. SCRAP*, 412 U.S. 669 (1973). In *SCRAP*, most of the nation's railroads filed with the Interstate Commerce Commission a proposed interim surcharge on freight rates, pending adoption of proposed permanent rate increases. Section 15(7) of the Interstate Commerce Act, 49 U.S.C. §15(7), vests exclusive power in the Commission to suspend rates pending its final decision on their lawfulness, and expressly withdraws from the judiciary any pre-existing power to grant such relief. The Commission refused to exercise its power under Section 15(7) to suspend the interim surcharge, but ordered the proposed permanent rate increases suspended for the statutory seven-month period.

Thereafter, environmental protection groups filed an action seeking a preliminary injunction to restrain enforcement of the Commission's orders until an environmental impact statement was prepared and considered pursuant to NEPA. The Supreme Court, in an opinion by Justice Stewart, held that NEPA did not amend or repeal by implication Section 15(7). The Court held that under this statute the Commission has exclusive authority to suspend rate increases, and that the federal courts lack jurisdiction, even in the absence of compliance with the environmental impact statement requirements of NEPA.

No such problem exists in the *Lathan* and *Keith* cases. The Court of Appeals did not hold that NEPA had amended or repealed any statute, implicitly or otherwise. As quoted above, the Court of Appeals only held that the policies of NEPA and Section 128(a) must be construed together in a consistent manner. The *SCRAP* decision is simply irrelevant to the *Lathan* and *Keith* cases and certainly presents no conflict.

Conclusion.

For the foregoing reasons, respondents respectfully submit that the petition for writ of certiorari should be denied.

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Respectfully submitted,

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